(1)

90-143



No. _____

# In The

# Supreme Court Of The United States

OCTOBER TERM, 1990

**STATE OF CONNECTICUT,**
**JOHN F. DIGIOVANNI,**
*Petitioners,*

v.

**BRIAN K. DOEHR,**
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

*Petitioners*

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## QUESTION PRESENTED

Whether the Connecticut *ex parte* attachment of real estate statute, which provides for a pre-attachment, probable cause determination by a state court judge, based upon a factual affidavit; a prompt post-attachment hearing; and an immediate appeal, satisfies the due process requirements of the Fourteenth Amendment to the United States Constitution?

## LIST OF PARTIES

In the United States District Court for the District of Connecticut the plaintiffs were Roland Pinsky, Jennie Pinsky, Eileen Fedowitz and Brian K. Doehr. The defendants were Richard K. Duncan, Joseph Golden Insurance Agency, Inc. and John F. DiGiovanni.

At the time of the Second Circuit decision, Roland Pinsky, Jennie Pinsky, Eileen Fedowitz, Richard K. Duncan and Joseph Golden Insurance Agency did not continue to participate in this litigation. Therefore they are not named as parties herein.

Intervention by the State of Connecticut as a party was permitted by the Second Circuit subsequent to oral argument therein. The only proper parties to this case at this time are petitioners State of Connecticut and John F. DiGiovanni and respondent Brian K. Doehr.



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No. _____

# In The

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OCTOBER TERM, 1990

**STATE OF CONNECTICUT,**
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*Petitioners,*

v.

**BRIAN K. DOEHR,**
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners, State of Connecticut, and John F. DiGiovanni, pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit originally entered on March 9, 1990, amended in response to petitions for rehearing on April 25, 1990, and as modified on June 25, 1990.

## OPINIONS OF THE COURTS BELOW

The original Judgment and Opinion of the United States Court of Appeals for the Second Circuit is reported at 898 F.2d 852 (2d Cir. 1990) and is printed in the appendix to this

brief at App. 1A.[1] A ruling issued on April 25, 1990, granting in part and denying in part petitions for rehearing, and amending the original judgment, is printed at App. 32A. An order refusing a suggestion for rehearing in *banc* was entered by the Second Circuit on May 30, 1990. App. 35A.

A modification of the ruling on Petitions for Rehearing was issued on June 25, 1990. App. 36A. An amended opinion on the Petitions, consolidating the Second Circuit's prior opinions of April 25, 1990, and June 25, 1990, was subsequently issued. App. 37A.

The memorandum of decision of the United States District Court for the District of Connecticut, *Eginton*, J., of February 17, 1989, is reported at 716 F. Supp. 58 (D. Conn. 1989). A copy of the opinion is printed in the Appendix. App. 40A.

The District Court directed the entry of judgment for the defendants in that decision. Judgment was entered on February 21, 1989, and is printed in the Appendix. App. 45A.

## JURISDICTION

The original judgment and the opinion of the United States Court of Appeals for the Second Circuit were made and entered on March 9, 1990, and copies are printed in the Appendix. App. 1A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). This petition is filed within ninety days of the ruling of partial grant and partial denial of petitioners' timely petitions for rehearing, issued by the Court of Appeals on April 25, 1990, which amended the original judgment of the Court, and is printed at App. 32A. Supreme Court Rule 13.4. *Missouri v. Jenkins*, 58 U.S.L.W. 4480, 4483 (U.S. April 18, 1990). *See also* 28 U.S.C. § 2101(c).

[1] In this petition, the abbreviation "App." refers to the Appendix herein and the abbreviation "R." refers to the Joint Appendix filed in the Second Circuit, taken from the Record in the District Court.



## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions. U.S. Const. Amend. XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Conn. Gen. Stat. § 52-278e(a)(1):

> **Allowance of prejudgment remedy without hearing. Notice to defendant. Subsequent hearing and order.** (a) The court or a judge of the court may allow the prejudgment remedy to be issued by an attorney without hearing as provided in sections 52-278c and 52-278d upon verification by oath of the plaintiff or of some competent affiant, that there is probable cause to sustain the validity of the plaintiff's claim and (1) that the prejudgment remedy requested is for an attachment of real property. . . .

## STATEMENT OF THE CASE

This petition arises from a civil action filed in the United States District Court for the District of Connecticut seeking, on federal due process grounds, to invalidate Conn. Gen. Stat. § 52-278e(a)(1),[2] the Connecticut prejudgment attachment of

[2] For the Court's convenience the entire chapter 903a of the Connecticut General Statutes, entitled "Prejudgment Remedies," is set forth at App. 54A-64A. The statute at issue herein — § 52-278e(a)(1) — is found in this chapter.

real estate statute. Jurisdiction was claimed in the District Court under 28 U.S.C. § 1331 and § 1343.

The District Court proceeding resulted from a Connecticut Superior Court civil action commenced on March 15, 1988. In the Superior Court for the Judicial District of New Haven at Meriden, John F. DiGiovanni ("DiGiovanni or Petitioner DiGiovanni") brought an action against Brian K. Doehr ("Doehr or Respondent Doehr") for an alleged assault and battery. App. 48A.

At the same time as the Superior Court action was instituted, and to secure the defendant's assets in the event of judgment, DiGiovanni applied for an attachment on real property of Doehr in the amount of $75,000. Pursuant to Conn. Gen. Stat. § 52-278c(a), DiGiovanni presented a judge of the Superior Court with the following: (1) an unsigned "writ, summons and complaint" setting forth his cause of action for assault and battery; (2) an application for prejudgment remedy reciting that the "prejudgment remedy requested is for an attachment of real property;" and (3) a factual affidavit of DiGiovanni demonstrating probable cause that judgment would be rendered in his favor. App. at 46A-48A.

Because DiGiovanni sought a real estate attachment rather than one on personal property, Conn. Gen. Stat. § 52-278e(a)(1), the statute at issue herein, exempted him from the further requirement of § 52-278c(a) that he schedule an adversary hearing prior to the Court's approval of the prejudgment remedy. Pursuant to § 52-278e(a)(1), after a probable cause review of DiGiovanni's papers, a judge of the Superior Court granted on March 17, 1988, the prejudgment remedy against Doehr's realty to the extent of $75,000. App. 49A.

Service of the attachment and complaint was subsequently made upon Doehr. At that time Doehr was given notice pursuant to § 52-278e(b) that he had a right to seek



a hearing to argue that the prejudgment remedy lacked probable cause or that it should be modified or vacated. He was also informed of his right to substitute a bond and to claim exemption from execution. App. 53A.

Instead of taking this course, Doehr, on August 8, 1988, brought suit against DiGiovanni in the United States District Court for the District of Connecticut, contending that § 52-278e(a)(1) was unconstitutional under the due process clause of the Fourteenth Amendment.[3]

Both plaintiff Doehr and defendant DiGiovanni moved for summary judgment in the District Court. R. 17, 24. The only "material facts" produced in accordance with Rule 56, Federal Rules of Civil Procedure and District Court local rule 9(c), were that (1) DiGiovanni had sued Doehr in state court, and (2) DiGiovanni was permitted an *ex parte* real estate attachment pursuant to § 52-278e(a)(1). R. 18, 25-27.

On February 16, 1989, the District Court, in response to this *facial* attack on the statute's constitutionality, granted judgment for Petitioner DiGiovanni. There were, the Court found, sufficient safeguards to protect a real property owner's due process rights. 716 F. Supp. 58, 60 (D. Conn. 1989), App. 43A.

Doehr appealed this decision to the United States Court of Appeals for the Second Circuit. Jurisdiction for this appeal was based upon 28 U.S.C. § 1291.

On March 9, 1990, the Second Circuit reversed in a decision containing three opinions. Judge Pratt concluded for the Court that § 52-278e(a)(1) was unconstitutional in violation

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[3] Two other plaintiffs joined Doehr, challenging § 52-278e(a)(1) out of wholly separate instances of attachment by different defendants. As indicated in the List of Parties, these other plaintiffs and defendants did not participate in the Court of Appeals for the Second Circuit and are not parties herein.

of due process because the statute permits attachments without prior notice and hearing in the absence of "extraordinary circumstances" and because the attaching party is not required to post an attachment bond. 898 F.2d at 858, App. 15A-16A.

Judge Mahoney, who found the conclusion "not entirely free from doubt," 898 F.2d at 859, App. 17A, concurred only in Judge Pratt's rationale regarding the lack of notice and hearing. He did not agree that a lack of a bond was a due process violation, as there were civil remedies which a debtor might pursue to recover for wrongful attachment. 898 F.2d at 860, App. 17A.

Judge Newman concluded in dissent that § 52-278e(a)(1) entirely satisfied due process, citing a unanimous opinion of the Connecticut Supreme Court and three individual Connecticut District Court decisions to support his view. 898 F.2d at 864, App. 31A.

In response to timely petitions for rehearing filed by petitioners, the Second Circuit on April 25, 1990, granted the petitions to the extent of making its March 9, 1990 holding prospective in effect. The remainder of the relief sought in the petitions was denied. App. 32A. On June 25, 1990, the Court modified its April 25, 1990 ruling to make the original opinion retroactive to cases challenging the constitutionality of the Connecticut statute filed prior to March 9, 1990, and still pending on that date. App. 36A.



## REASONS FOR GRANTING THE WRIT

### I. THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT HAS RENDERED A DECISION IN CONFLICT WITH DECISIONS OF THE CONNECTICUT SUPREME COURT.

Certiorari should be granted in this case because the Second Circuit has rendered a decision in conflict with decisions of the Connecticut Supreme Court upholding the constitutionality of the state statute at issue.

Judge Pratt's opinion struck down § 52-278e(a)(1) for failure to provide notice and hearing prior to the seizure. This decision relies heavily on two of the four significant cases in the area of prejudgment remedies, *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (pre-suit garnishment of wages disapproved), and *Fuentes v. Shevin*, 407 U.S. 67 (1972) (replevin statute unconstitutional).[4] It gives little weight to the subsequent cases of *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) allowing an *ex parte* remedy and to *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) which explicitly sets forth the "saving characteristics" (*Id.* at 605-606) needed to sustain a pre-judgment *ex parte* seizure.[5]

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[4] *Fuentes v. Shevin* involved the total deprivation of personal property and is, as the dissent in *Pinsky* recognized, 898 F.2d at 862, 863, App. 26A-27A, hardly in point here. In *Fuentes* the Court struck down replevin statutes because they "work a deprivation of property without due process of law insofar as they deny the right to prior opportunity to be heard before *chattels* are taken from their possessor." 407 U.S. at 96 (emphasis added). In one instance a creditor had repossessed a stove and a stereo, in another a bed, a table, and other household goods. *Id.* at 70, 71. These seizures were especially harsh, the Court noting that the goods were "dearly bought and protected by contract . . ." *Id.* at 86.

[5] Nor does Judge Pratt's opinion consider the effect of the most recent Supreme Court decision considering the general issue involved. In *Zinermon v. Burch*, 58 U.S.L.W. at 4228 (U.S. February 27, 1990), this Court

*(continued)*

Indeed, prior to the instant case, the Second Circuit had stated, following *Mitchell* and *Di-Chem*, that the general rule was that "prejudgment *ex parte* attachments are constitutional if issued by a neutral judicial officer on the basis of factual representations regarding the merits of the plaintiff's claim and immediately followed by notice to the defendant and by an opportunity to contest the seizure." *McCahey v. L.P. Investors*, 774 F.2d 543, 548 (2d Cir. 1985).

In contrast to the Second Circuit, the Connecticut Supreme Court has relied on *Mitchell* and *Di-Chem* to sustain § 52-278e(a)(1). In *Fermont Div., Dynamics Corp. of America v. Smith*, 178 Conn. 393, 423 A.2d 80 (1979), then Justice Peters[6] considered the constitutionality of § 52-278e.

Citing *Roundhouse Construction Corp. v. Telesco Masons Supplies Co.*, 168 Conn. 371, 380, 362 A.2d 778 (1975), the Court in *Fermont* considered whether the attachment procedure complies with due process "in its entirety" noting that "the lack of provision for a prior hearing in and of itself will not be constitutionally fatal if other saving characteristics are present." Justice Peters concluded:

> Section 52-278e exhibits all the saving characteristics that the law of procedural due process

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[5] *(continued)*
quoted in part from *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 19 (1978):

> " '[W]here the potential length or severity of the deprivation does not indicate a likelihood of serious loss and where the procedures . . . are sufficiently reliable to minimize the risk of erroneous determination' a prior hearing may not be required."

This sets forth the proper standard of due process for Connecticut's *ex parte* real estate attachment process, where the length of deprivation is short and the harm to the attached party is much less severe than where chattels are seized. In this record there is no specific showing of harm.

[6] Hon. Ellen Ash Peters has, subsequent to *Fermont*, become Chief Justice of the Connecticut Supreme Court.



> requires. The statute provides for adequate judicial supervision of the entire process of seizure, and does not permit writs to be issued by a court clerk. The statute can be invoked only by a verified affidavit that contains factual, rather than merely conclusory, supporting allegations. Most important, the statute affords to the defendant whose property has been attached the opportunity to obtain an immediate postseizure hearing at which the prejudgment remedy will be dissolved unless the moving party proves probable cause to sustain the validity of his claim.

*Id.* at 397–398.

*Fermont*'s holding that the entire section — now codified as § 52-278e(a) — meets due process was applied and reaffirmed in *Kukanskis v. Griffith*, 180 Conn. 501 (1980) to § 52-278e(a)(1), the attachment statute for real estate. There the Court recognized the importance *Fermont* had placed upon supplying a factual showing of probable cause prior to the seizure. The Court continued:

> Because § 52-278e(1) requires a factual showing that probable cause exists to sustain the validity of the plaintiff's claim, it comports with constitutional requirements. See also *Ledgebrook Condominium Assn., Inc. v. Lusk Corporation*, 172 Conn. 577, 583, 376 A.2d 60 (1977).

*Id.* at 505.[7]

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[7] The Connecticut Supreme Court has also held a virtually identical statute — allowing for the placement of lis pendens notice *ex parte* on the land records, followed by an immediate opportunity to dissolve — constitutional in *Williams v. Bartlett*, 189 Conn. 471, 457 A.2d 240 (1983). Significantly this Court dismissed an appeal in *Williams*, 464 U.S. 801 (1983). Under *Hicks v. Miranda*, 422 U.S. 322 (1975) this affirmance should have been binding on the Second Circuit in the instant case. Judge Pratt does not even cite to *Williams*, Judge Mahoney distinguishes the case, while Judge Newman believes it "indistinguishable" from *Pinsky*. *See also Spielman-Fond, Inc. v. Hanson's, Inc.*, 397 F. Supp. 997 (D.Ariz. 1973), *aff'd* 417 U.S. 901 (1974) (mechanic's lien satisfies due process).

The dissent in *Pinsky* had no doubt that the majority was in conflict with the Connecticut Supreme Court and Connecticut Federal District Court decisions. Judge Newman forcefully concludes as follows:

> Connecticut's procedure for prejudgment real estate attachments has been held to comport with due process requirements by a unanimous Connecticut Supreme Court, *see Fermont Division, Dynamics Corp. of America, Inc. v. Smith*, 178 Conn. 393, 423 A.2d 80 (1979) (Peters, J.), and by three judges of the District Court for the District of Connecticut, *see Shaumyan v. O'Neill*, 716 F. Supp. 65 (D. Conn. 1989) (Nevas, J.); *Pinsky v. Duncan*, 716 F. Supp. 58 (D. Conn. 1989) (Eginton, J.): *Read v. Jacksen*, Civ. No. B-85-85 (D. Conn. Feb. 18, 1988) (Zampano, J.). The opinions of now Chief Justice Peters in *Fermont* and of Judge Nevas in *Shaumyan* are particularly thoughtful and persuasive. Though in dissent, I am pleased to note my agreement with their views.

*Id.*, 898 F.2d at 864–865, App. 31A.

This direct conflict between the *Pinsky* majority opinion in the Second Circuit and the highest court of the state justifies granting the writ of certiorari. Supreme Ct. Rule 10.1(a); *Lakeside v. Oregon*, 435 U.S. 333, 336, n.3 (1978); Stern, Gressman and Shapiro, *Supreme Court Practice* (6th ed. 1986) at 209.[8]

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[8] Review appears especially appropriate where the State Supreme Court and Federal Appellate Court differ over the constitutionality of State Court procedure. *Pennzoil v. Texaco, Inc.*, 481 U.S. 1 (1987). At this time at least two superior court judges have indicated that the State Supreme Court opinion controls, not the Second Circuit opinion. *Soden v. Johnson*, No. CV83-0067730-S (Stamford-Norwalk Superior Court, March 26, 1990); *Chase Manhattan Bank, N.A. v. Shea*, No. CV89-0102197-S (Stamford-Norwalk Superior Court, March 27, 1990).



## II. THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT HAS RENDERED A DECISION IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS.

Certiorari should be granted in this case because the United States Court of Appeals for the Second Circuit has rendered a decision in conflict with decisions of other Courts of Appeals on the same issue.

While the Second Circuit held that Connecticut's statute fails to meet due process standards because of the lack of a pre-attachment hearing, the Ninth Circuit has upheld the constitutionality of a Washington statute permitting the *ex parte* attachment of real property. In *Matter of Northwest Homes of Chehalis, Inc.*, 526 F.2d 505 (9th Cir. 1975), *cert. denied sub. nom., Hansen v. Weyerhaeuser Co.*, 425 U.S. 907 (1976),[9] the Court of Appeals found that the "challenged procedure comported with due process," *Id.* at 507, because it "provides for an early hearing at which the creditor is required to demonstrate that the writ was properly and regularly issued." *Id.* at 507. In reaching this conclusion, the Court specifically relied upon the standards set forth in *Mitchell* and *Di-Chem*, two cases distinguished by the Second Circuit.

A three-judge court[10] for the Middle District of North Carolina considered the constitutionality of the North Carolina statute[11] which permitted "the prejudgment attachment

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[9] The Court also explicitly found that the potential harm from a real estate attachment is much less significant than a seizure of personalty.

[10] This Court has treated federal three-judge Courts similar to Courts of Appeals for conflict purposes. *See, e.g., Memorial Hospital v. Maricope County*, 415 U.S. 250, 253 (1974).

[11] While the North Carolina statute did not apply, as does Connecticut's, to every attachment of realty, the Court in *Hutchinson* specifically did not rest its opinion on whether there were "extraordinary situations" set forth in the statute. The issue was whether *Mitchell* and *Di-Chem* sustained all *ex parte* real estate attachments. 392 F. Supp. at 895, n.8.

of real estate without prior notice and hearing" in *Hutchinson v. Bank of North Carolina*, 392 F. Supp. 888 (M.D.N.C. 1975). Applying *Mitchell* and *Di-Chem*, that Court held that there were extensive safeguards for the debtor, including an affidavit and post-seizure hearing, as well as a balanced protection of the creditor's rights. Moreover, unlike the *Pinsky* majority,[12] the three-judge Court in *Hutchinson* held that the test for constitutionality is "*not* confined to situations where there is a duality of interest in the attached property." *Id.* at 898 (emphasis in original). The remedy is available to all creditors or claimants regardless of prior or current interest in the premises.

The Third Circuit followed the *Hutchinson* approach in a case striking down Pennsylvania's foreign real estate attachment law. *Jonnet v. Sav. Bank of the City of New York*, 530 F.2d 1123 (3d Cir. 1976). According to *Jonnet*, seizures may be accomplished without prior notice and hearing only upon submission of a factual affidavit, which has been reviewed by a competent official; where there is protection for wrongful seizures; and where there is a right to an immediate post-attachment hearing. The defendant debtor should also have the right to substitute other property for the attached realty. *Id.* at 1129–1130. The Connecticut statute at issue in the present case, Conn. Gen. Stat. § 52-278e(a)(1), meets each of these criteria. Clearly the Second Circuit's analysis conflicts with the Third Circuit's.

The Fifth Circuit's summary of the relevant law is directly on point and again conflicts with the *Pinsky* majority. According to that Circuit: "[A]bsent pre-seizure notice and opportunity to be heard, prejudgment seizure is unconstitutional *unless* it is authorized by a judge with discretion to deny the writ and is promptly followed by a hearing, *or* unless

[12]Judge Pratt distinguishes *Mitchell*, which approved an *ex parte* seizure, because in *Mitchell* "the attached property is exclusively the property of the defendant . . . . The plaintiff hold[s] no present interest in the property sought to be seized." 898 F.2d at 855, App. 9A.



it occurs in an 'extraordinary situation.' " *Johnson v. America Credit Co. of Georgia*, 581 F.2d 526, 535 n.16 (5th Cir. 1978) (emphasis added).[13]

Thus there is a direct conflict between other Courts of Appeals and the majority decision of the Second Circuit in *Pinsky*. The conflict justifies this Court in issuing a writ of certiorari. Supreme Ct. Rule 10.1(a).

[13]The contrary *Pinsky* rule is as follows: "[A] prior hearing may be postponed where exceptional circumstances justify such a delay, *and where* sufficient additional safeguards are present." 898 F.2d at 855, App. 8A (emphasis in original). This is not the law in the Ninth, Third or Fifth Circuits. *See also Shaumyan, supra* at note 6; *Christiano v. Court of the Justices of the Peace*, 669 F. Supp. 662, 669 (D. Del. 1987).

## CONCLUSION

For all of the foregoing reasons, petitioners respectfully submit that this Petition should be granted and a writ of certiorari should issue to review the judgment and opinion of the U.S. Court of Appeals for the Second Circuit.

Respectfully submitted.

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*STATE OF CONNECTICUT:*

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**APPENDIX**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 201—August Term 1989

Argued: October 5, 1989 Decided: March 9, 1990

Docket No. 89-7521

ROLAND PINSKY, JENNIE PINSKY, EILEEN FEDOWITZ and BRIAN K. DOEHR,

*Plaintiffs-Appellants*,

—against—

RICHARD K. DUNCAN, JOSEPH GOLDEN INSURANCE AGENCY, INC. and JOHN F. DI GIOVANNI,

*Defendants*,

RICHARD K. DUNCAN and JOHN F. DI GIOVANNI,

*Defendants-Appellees*,

STATE OF CONNECTICUT,

*Intervenor*.

Before:

NEWMAN, PRATT, and MAHONEY,

*Circuit Judges*.

Appeal from summary judgment of United States District Court for the District of Connecticut, Warren W. Eginton, *Judge*, dismissing complaint that challenged, on due process grounds, Connecticut statute governing prejudgment attachment of real estate.

Reversed.

Judge Mahoney concurs in a separate opinion; Judge Newman dissents in a separate opinion.

---

JOANNE S. FAULKNER, New Haven, CT, *for Plaintiff-Appellant Brian K. Doehr.*

ANDREW M. CALAMARI, Bronx, NY (Calamari & Calamari, of Counsel), *for Defendant-Appellee John F. Di Giovanni.*

Henry S. Cohn, Hartford, CT, Assistant Attorney General of the State of Connecticut (Clarine Nardi Riddle, Attorney General of the State of Connecticut, of Counsel), *for Intervenor.*

---

PRATT, *Circuit Judge*:

In this appeal we consider the constitutionality of a statute that authorizes prejudgment attachment of real estate without prior notice and opportunity for a hearing, and without requiring the person obtaining the attachment to post a bond. Conn. Gen. Stat.



§ 52-278e(a)(1). Brian K. Doehr, a Connecticut landowner whose property was attached under this statute, appeals from a summary judgment of the United States District Court for the District of Connecticut, Warren W. Eginton, *Judge*, reported at 716 F. Supp. 58. Doehr claims that § 52-278e(a)(1) is unconstitutional on its face. For the reasons below, we agree. We therefore reverse and remand for entry of judgment in favor of Doehr.

## BACKGROUND

Attachment is an extraordinary prejudgment remedy that enables a plaintiff to secure a contingent lien on defendant's property at the inception of a lawsuit. It has traditionally served the dual purposes of compelling the appearance of a defendant who cannot otherwise be haled into court, and providing security for any judgment that plaintiff might ultimately recover. *See* 7 C.J.S. *Attachment* § 4 (1980).

Under Connecticut law, a prejudgment attachment may sometimes be obtained after notice to defendant and a hearing, Conn. Gen. Stat. §§ 52-278c, 52-278d, or, in some cases, even without notice and a hearing. § 52-278e. In neither case is the plaintiff required to post a bond or other security for the payment of damages the defendant may sustain either if the attachment is wrongfully issued or the plaintiff's claim ultimately proves to be meritless. The portion of the statute governing the *ex parte* attachment of real estate provides in relevant part:

> The court or a judge of the court may allow the prejudgment remedy to be issued by an attorney without hearing as provided in sections 52-278c and

52-278d upon verification by oath of the plaintiff or of some competent affiant, that there is probable cause to sustain the validity of the plaintiff's claim and (1) that the prejudgment remedy requested is for an attachment of real property * * *.

In March 1988, John F. Di Giovanni commenced an action for assault and battery against Doehr in Connecticut Superior Court. At the inception of this lawsuit, and before any process had been served on Doehr, Di Giovanni applied for an attachment on Doehr's property in Meriden, Connecticut. As required by the statute, Di Giovanni submitted an affidavit in support of his application, in which he stated that "I was willfully, wantonly and maliciously assaulted by the defendant, Brian K. Doehr. * * * Said assault and battery broke my left wrist and further caused an ecchymosis to my right eye, as well as other injuries to my head, limbs and body. * * * In my opinion, the foregoing facts are sufficient to show that there is probable cause that judgment will be rendered for the plaintiff." Based on these submissions, the state court authorized an attachment on Doehr's home to the value of $75,000.

Rather than moving to dissolve the attachment, as he was entitled to do under the statute, § 52-278e(c), Doehr filed the present action in federal district court, alleging that Connecticut's *ex parte* attachment procedure violated his constitutional right to due process. On Di Giovanni's motion for summary judgment, the district court held that § 52-278e is constitutional because "it requires the prejudgment remedy to be issued by a judge", " 'can be invoked only by a verified affidavit that contains factual, rather than merely conclusory, supporting allegations' ", *quoting Fermont Div.*,



*Dynamics Corp. of America v. Smith*, 178 Conn. 393, 397, 423 A.2d 80 (1979), and provides for a "prompt post-seizure hearing" at which the property owner may challenge the attachment. 716 F. Supp. at 60. Doehr now appeals that ruling.

Since the constitutionality of a state statute "affecting the public interest is drawn in question" by this lawsuit, the district court was required to "certify such fact to the attorney general of the State" for the purpose of allowing the state to intervene on the constitutional issue. 28 U.S.C. § 2403(b). Although the district court failed to follow this procedure, we invited the state to file an intervenor's brief in this appeal, consistent with our resolution of a similar problem in *Merrill v. Town of Addison*, 763 F.2d 80, 82-83 (2d Cir. 1985). The state elected to intervene, and we give careful consideration to its arguments in this decision.

## DISCUSSION

### A. *Deprivation of a Protected Property Interest?*

As a threshold matter, we must determine whether the "seizure" at issue in this case—a nonpossessory attachment of real estate—deprives the owner of a significant property interest within the meaning of the fourteenth amendment. Di Giovanni argues that our decision on this point is controlled by the Supreme Court's summary affirmance of *Spielman-Fond, Inc. v. Hanson's, Inc.*, 379 F. Supp. 997 (D. Ariz. 1973) (three-judge court) (per curiam), which held that "the filing of mechanic's and materialmen's lien does not amount to a taking of a significant property interest". *Id.* at 999, *aff'd mem.*, 417 U.S. 901 (1974). However, notwithstanding the lim-

ited precedential value of a summary affirmance, *see, e.g., Tulley v. Griffin, Inc.*, 429 U.S. 68, 74 (1976), we note that the mechanic's lien statute upheld in *Spielman-Fond* required the creditor to have a pre-existing right to the property, whereas Connecticut's attachment procedure is available in a variety of contexts, including the present case, to individuals having no preexisting interest in the property to be attached.

Moreover, although an attachment of real estate does not deprive the landowner of the use and possession of his property, and thus does not amount to a "seizure" in the literal sense, it nevertheless has a significant impact on the owner's ability to exercise the full scope of his property rights. An attachment not only impairs the marketability of the real estate, but also may harm the owner's credit rating, and may prevent him from using the property as collateral for a loan. Even if short-lived, these effects are certainly worthy of due process protection. *See Fuentes v. Shevin*, 407 U.S. 67, 86 (1972) ("The Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property"). Consequently, we hold that a nonpossessory attachment of real estate deprives the owner of a constitutionally protected property interest under the fourteenth amendment. *Accord Shaumyan v. O'Neill*, 716 F. Supp. 65, 77-79 (D. Conn. 1989); *MPI v. McCullough*, 463 F. Supp. 887, 901 (N.D. Miss. 1978); *Terranova v. AVCO Financial Servs.*, 396 F. Supp. 1402, 1406-07 (D. Vt. 1975) (three-judge court); *Hutchison v. Bank of N.C.*, 392 F. Supp. 888, 894 (M.D.N.C. 1975) (three-judge court); *Bay State Harness Horse Racing & Breeding Assn. v. PPG Indus., Inc.*, 365 F. Supp. 1299, 1304-06 (D. Mass. 1973) (three-judge court); *Gunter v. Merchants Warren Nat'l Bank*, 360 F. Supp. 1085, 1090



(D. Me. 1973) (three-judge court); *Clement v. Four N. State St. Corp.*, 360 F. Supp. 933, 935 (D.N.H. 1973) (three-judge court).

B. *Ex Parte Attachment.*

Doehr argues that § 52-278e(a) is invalid, first, because it dispenses with prior notice and opportunity for a hearing even in the absence of exigent circumstances. A "root requirement" of due process is the right to a hearing before being deprived of a significant property interest unless the state demonstrates "some valid governmental interest * * * that justifies postponing the hearing until after the event." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (footnote omitted); *see also United States v. Premises & Real Property at 4492 S. Livonia Rd.*, 889 F.2d 1258, 1263 (2d Cir. 1989). Thus, in *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339 (1969), the Court emphasized that state garnishment procedures must ordinarily provide for a pre-deprivation hearing except in situations "requiring special protection to a state or creditor interest". In *Fuentes* the Court made it clear that the type of "extraordinary circumstances" that warrant postponing the hearing "must be truly unusual", such as the need "to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, [or] to protect the public from misbranded drugs and contaminated food." 407 U.S. at 90-92 (citations omitted).

Although the Court later upheld a Louisiana sequestration statute that authorized the seizure of personal property without notice and opportunity for a hearing, *see Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974), the application of that statute was explicitly limited to

unusual situations where "it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action." *Id.* at 605. Because the creditor in *Mitchell* claimed a preexisting right to consumer goods held by the debtor, and because the creditor's lien would expire under Louisiana law the moment the debtor transferred possession, any prior notice would enable the debtor to transfer the goods before the hearing and thereby defraud the creditor. Thus there was a compelling reason to postpone notice and hearing until after the sequestration had initially taken effect. As the Court put it, "there is a real risk that the buyer, with possession and power over the goods, will conceal or transfer the merchandise to the damage of the seller. This is one of the considerations weighed in the balance by the Louisiana law in permitting initial sequestration of the property. * * * [N]otice itself may furnish a warning to the debtor acting in bad faith." *Id.* at 609.

The rule to be derived from *Sniadach* and its progeny, therefore, is not that post-attachment hearings are generally acceptable provided that plaintiff files a factual affidavit and that a judicial officer supervises the process, but that a prior hearing may be postponed where exceptional circumstances justify such a delay, *and where* sufficient additional safeguards are present. *See Terranova*, 396 F. Supp. at 1407 ("The Supreme Court decisions in [*North Georgia Finishing*, *Mitchell*, *Fuentes*, and *Sniadach*] dictate that *except in extraordinary situations* the prejudgment attachment of real estate belonging to an in-state resident may be effected only after notice to the owner and a hearing") (emphasis added) (footnotes omitted). The only decision in the *Sniadach*



line of cases to find a post-deprivation hearing constitutionally acceptable, *Mitchell*, carefully limited the reach of its holding to the particular circumstances of the case:

> Plainly enough, this is *not* a case where the property sequestered by the court is exclusively the property of the defendant debtor. The question is *not* whether a debtor's property may be seized by his creditors, *pendente lite*, where they hold no present interest in the property sought to be seized.

416 U.S. at 604 (emphasis added); *see also North Georgia Finishing, Inc. v. Di-Chem*, 419 U.S. 601, 609 (1975) (Powell, J., concurring) (suggesting that *Mitchell* has been relegated "to its narrow factual setting").

In sharp contrast to *Mitchell*, the case before us *does* present a situation where the attached property "is exclusively the property of the defendant", and where the plaintiff "hold[s] no present interest in the property sought to be seized." Di Giovanni sued Doehr because Doehr allegedly assaulted him, breaking his wrist, blackening his eye, and causing various other injuries. Assuming the truth of these bare allegations, and without giving Doehr an opportunity to present his own version of the facts, the court issued an attachment on Doehr's home. There were no allegations that Doehr was about to fraudulently dispose of his home, nor was the attachment necessary to obtain personal jurisdiction over Doehr. Since exigent circumstances of this nature clearly formed the basis for permitting an *ex parte* seizure in *Mitchell*, we can hardly rely on *Mitchell* to uphold a procedure that makes such circumstances irrelevant to the inquiry.

The highly factual nature of the issues involved in the *ex parte* proceeding gives us further reason to doubt the adequacy of existing procedures. The dispositive issues in the *ex parte* proceeding in *Mitchell* were simply whether the creditor possessed a lien on goods in the debtor's possession, and whether the debtor had defaulted on his payments. The Court stressed that these were "uncomplicated matters that lend themselves to documentary proof" and that "[t]he nature of the issues at stake minimizes the risk that the writ will be wrongfully issued by a judge." 416 U.S. at 609-10. Distinguishing *Fuentes*, the Court observed:

> In Florida and Pennsylvania property was only to be replevied in accord with state policy if it had been "wrongfully detained." This broad "fault" standard is inherently subject to factual determination and adversarial input. * * * [I]n *Fuentes* this fault standard for replevin was thought ill-suited for preliminary *ex parte* determination. In Louisiana, on the other hand, the facts relevant to obtaining a writ of sequestration are narrowly confined. As we have indicated, documentary proof is particularly suited for questions of the existence of a vendor's lien and the issue of default. There is thus far less danger here that the seizure will be mistaken and a corresponding decrease in the utility of an adversary hearing which will be immediately available in any event.

*Id.* at 617-18; *see also Mathews v. Eldridge*, 424 U.S. 319, 343-44 (1976) (medical determination of disability is "sharply focused and easily documented", and thus "[t]he potential value of [a pre-deprivation] evidentiary



hearing * * * is substantially less in this context than in *Goldberg [v. Kelley*, 397 U.S. 254 (1970)]").

Unlike the procedures upheld in *Mitchell* and *Mathews*, Connecticut's *ex parte* proceeding involves the court in a host of difficult factual questions. To issue an attachment, the judge must determine whether "there is probable cause to sustain the validity of the plaintiff's claim". § 52-278e(a). The statute is not limited to simple debtor-creditor disputes, where the likelihood of recovery often can be ascertained from documentary proof submitted by the creditor. Instead, the attachment procedure is available in all civil actions, including those arising from such fact-specific events as fist fights, as illustrated by the facts of the present action. In such a case, how can the judge realistically determine the factual validity of the claim when presented with only the plaintiff's version of the altercation? Requiring the plaintiff to file a factual affidavit, though certainly helpful, is of little assistance when the affidavit merely recites facts that are certain to be sharply disputed by the other party. Because the risk of a wrongful attachment is considerable under these circumstances, we conclude that dispensing with notice and opportunity for a hearing until after the attachment, without a showing of extraordinary circumstances, violates the requirements of due process.

Despite the highly error-prone nature of Connecticut's pre-attachment procedure, Di Giovanni and the state insist that the private interest at stake is so minuscule that a prior hearing is not constitutionally required. We are unpersuaded by this argument. An attachment can have a substantial impact on a landowner's ability to sell his property, secure a loan, or obtain credit. Given a

particularly unlucky set of circumstances, even a temporary attachment can lead to foreclosure proceedings against the homeowner. *See Hiers v. Cohen*, 31 Conn. Supp. 305, 329 A.2d 609 (Super. Ct. Hartford Co. 1973). In any event, the individual's interest in a prior hearing certainly outweighs the state's interest in postponing the hearing until after attachment, which, in the absence of unusual circumstances, is practically nil. *See Shaumyan*, 716 F. Supp. at 81 (state's interest "seems minimal at best").

C. *Attachment Bond.*

Doehr claims that § 52-278e is also defective because it does not require the plaintiff to post a bond or other security before obtaining an attachment. Most state attachment statutes include at least some procedure for indemnifying the defendant for any loss caused by a wrongful attachment. *See Shaumyan*, 716 F. Supp. at 81. In *Mitchell*, for example, the Louisiana sequestration statute required the plaintiff to file a bond "sufficient • • • to protect the [defendant] against all damages in the event the sequestration is shown to have been improvident." 416 U.S. at 606. The statute further empowered the court to assess damages in favor of the defendant, including attorney's fees, "whether the writ is dissolved on motion or after trial on the merits." *Id.* at 617. These damages were not limited to actual out-of-pocket losses, but included "injury to social standing or reputation as well as humiliation and mortification." *Id.* at 606 n.8.

The *Mitchell* Court clearly found the bond requirement of the Louisiana statute to play an essential role in protecting the defendant from the effects of an erroneous seizure. *See* 416 U.S. at 610, 617. Justice Powell, in his concurring opinion in *North Georgia Finishing*, stated that "the provision of adequate security" is an indispensable procedural safeguard, 419 U.S. at 611, and four circuit courts have expressed the view that the lack of a bond or damages provision would invalidate an attachment statute. *See Watertown Equip. Co. v. Norwest Bank Watertown*, 830 F.2d 1487, 1493-94 (8th Cir. 1987) ("Clearly, the centrality of an adequate bond for the protection of the debtor was well established by 1975."), *cert. denied*, 108 S. Ct. 1723 (1988); *Jones v. Preuit & Mauldin*, 822 F.2d 998, 1002 (11th Cir. 1987) (debtor's "financial interest must be protected in the event of a wrongful prejudgment attachment, either via the posting of a bond by the creditor who seeks the writ, or by allowing an action for damages suffered as a result of a wrongful attachment"), *vacated on other grounds*, 851 F.2d 1321 (11th Cir. 1988) (in banc), *vacated and remanded mem.*, 109 S. Ct. 1105 (1989); *United States v. Vertol H21C, Reg. No. N8540*, 545 F.2d 648, 652 (9th Cir. 1976); *Jonnet v. Dollar Savings Bank of City of New York*, 530 F.2d 1123, 1130 (3d Cir. 1976) ("[T]he Pennsylvania attachment rules offer no machinery to indemnify a defendant for damages due to wrongful attachment • • • . A constitutionally valid statute must afford such protection, by bond or otherwise.").

The state concedes that defendants must be protected against the wrongful attachment of their property, but insists that Connecticut's vexatious litigation statute, Conn. Gen. Stat. § 52-568, provides adequate protection. Under that statute,

> Any person who commences and prosecutes any civil action or complaint against another, in his own name, or the name of others, or asserts a defense to any civil action or complaint commenced and prosecuted by another (1) without probable cause, shall pay such other person double damages, or (2) without probable cause, and with a malicious intent unjustly to vex and trouble such other person, shall pay him treble damages.

The state argues that this remedy is all that due process requires, an assertion that, on the surface, appears to find support in the eleventh circuit's dictum in *Jones* that a debtor's interests can be adequately protected "*either* via the posting of a bond by the creditor who seeks the writ, *or* by allowing an action for damages suffered as a result of a wrongful attachment." *Jones*, 822 F.2d at 1002 (emphasis added); *see also Shaumyan*, 716 F. Supp. at 80-81 (suggesting that *Jones* makes a separate action for damages "an option to the pre-seizure posting of a creditor's bond"). The "action for damages" discussed in *Jones*, however, was made part of the attachment procedure itself, and the creditor was required to post a bond to cover any such damages. *See Jones*, 822 F.2d at 1003-04 (discussing Ala. Code §§ 35-11-111 and 6-6-148). Thus in *Jones* the defendant could both challenge the propriety of the attachment and recover his damages in the same proceeding, held "before, during, or after the action in which the debtor appears as a defendant." *Jones*, 822 F.2d at 1004 (citing *First National Bank v. Cheney*, 120 Ala. 117, 23 So. 733 (1897)).

It is entirely different to require the defendant, as Connecticut does, to wait for judgment in the underlying action, and only then prosecute a claim for vexatious litigation. This subjects the defendant not only to the delay and expense of additional litigation, but deprives him of any remedy whatsoever if the underlying action is settled. *Blake v. Levy*, 191 Conn. 257, 464 A.2d 52 (1983) ("When a lawsuit ends in a negotiated settlement or compromise, it does not terminate in the plaintiff's favor and therefore will not support a subsequent lawsuit for vexatious litigation."). This is particularly troubling in view of the fact that the mere existence of the attachment may weigh heavily in the defendant's decision to reach a settlement. *See* Note, *The Constitutionality of Real Estate Attachments*, 37 Wash. & Lee L. Rev. 701 n.1 (1980) ("Today attachment, if available, is often used as a tactical maneuver to put pressure on a defendant to reach an expeditious settlement of a legal dispute.") (citing New York Judicial Council, *Seventh Annual Report* 391-93 (1941)); Kheel, *New York's Amended Attachment Statute: A Prejudgment Remedy in Need of Further Revision*, 44 Brooklyn L. Rev. 199, 201 (1978) (attachment "can lead a defendant to settle a dispute promptly although he may think it likely that he would ultimately prevail against plaintiff's claim").

For these reasons, we believe that Connecticut's vexatious litigation statute offers inadequate protection against wrongful attachment, and we conclude that the lack of a bond or security provision in the attachment procedure itself is a flaw of constitutional magnitude.

## CONCLUSION

We hold that Conn. Gen. Stat. § 52-278e violates the requirements of due process because (1) it permits the issuance of *ex parte* attachments in the absence of

extraordinary circumstances, and (2) it fails to require the plaintiff to post a bond or other security before obtaining the attachment. The judgment of the district court is reversed and the case is remanded for entry of judgment in favor of Doehr declaring § 52-278e unconstitutional.

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MAHONEY, *Circuit Judge*, concurring in the result:

I agree with Judge Pratt that Conn. Gen. Stat. § 52-278e(a)(1) (West Supp. 1989) is unconstitutional under the fourteenth amendment because, in providing for attachment of real property in civil actions without any pre-attachment hearing, it authorizes deprivations of property without due process of law. I reach this conclusion, however, only because this provision allows attachments of real property whenever a plaintiff makes a sworn showing to a judge "that there is probable cause to sustain the validity of the plaintiff's claim," without any further requirement of exceptional or extraordinary circumstances to justify the attachment. By contrast, when personal property is attached, the same statute (in the same sentence) requires the plaintiff to establish, in addition to the threshold probable cause showing—

> that there is reasonable likelihood that the defendant (A) neither resides in nor maintains an office or place of business in this state and is not otherwise subject to jurisdiction over his person by the court, or (B) has hidden or will hide himself so that process cannot be served on him or (C) is about to remove himself or his property from this state or (D) is about to fraudulently dispose of or has fraudulently disposed of any of his property with



> intent to hinder, delay or defraud his creditors or (E) has fraudulently hidden or withheld money, property or effects which should be liable to the satisfaction of his debts or (F) has stated he is insolvent or has stated he is unable to pay his debts as they mature.

Conn. Gen. Stat. § 52-278e(a)(2) (West Supp. 1989).

I do not agree, however, with Judge Pratt's conclusion "that the lack of a bond or security provision in the attachment procedure itself is a flaw of constitutional magnitude," and therefore write separately.

Turning first to the areas of my agreement with Judge Pratt's thoughtful opinion, I concur that an attachment results in the deprivation of a constitutionally protected property interest. The deprivation is concededly less severe than in the cases, for example, of a seizure of property or a garnishment of wages. In my view, however, the reasons articulated and precedents cited by Judge Pratt establish that although this consideration impacts upon the extent of constitutionally required protection, *some* such protection in the case of an attachment of real property is warranted.

I also concur that the absence of any requirement of extraordinary circumstances in the case of an attachment of real property renders section § 52-278e(a)(1) unconstitutional, although this conclusion is not entirely free from doubt. Since Judge Pratt has stated the case for this position with both clarity and force, I will confine myself to addressing two objections to it that seem, at least to me, to merit consideration.

First, *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606 (1975), can be read to intimate that

only an "early hearing," and not necessarily a pre-attachment hearing, is constitutionally required. In that event, the provision in section 52-278e(c) for an expeditious post-attachment hearing, at which the owner of property subjected to the attachment may challenge the initial determination of probable cause, would render section 52-278e(a)(1) constitutionally valid.

Second, Conn. Gen. Stat. §§ 52-325, 52-325a and 52-325b (West Supp. 1989), which make the lis pendens procedure routinely available in actions "intended to affect real property" and, like section 52-278e, provide only for a post-filing hearing, were upheld against constitutional challenge in *Williams v. Bartlett*, 189 Conn. 471, 457 A.2d 290, *appeal dismissed for want of a substantial federal question*, 464 U.S. 801 (1983). The Supreme Court's dismissal of this appeal was a dismissal on the merits and a binding precedent, *see Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975); 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure § 4014, at 638-39 (1977 & Supp. 1989), although "not entitled to the same deference given a ruling after briefing, argument, and a written opinion." *Caban v. Mohammed*, 441 U.S. 380, 390 n.9 (1979). *Williams* provides an arguable precedent for upholding section 52-278e(a)(1) against a due process challenge.

As we recently said, however:

> As a general rule, due process has been held to require notice and an *opportunity to be heard prior to the deprivation of a property interest*, see *Fuentes v. Shevin*, 407 U.S. 67, 81-82, 92 S.Ct. 1983, 1994-95, 32 L.Ed.2d 556 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 342, 89 S.Ct. 1820, 1823, 23 L.Ed.2d 349 (1969), *in the absence of an " 'extraordinary situation[ ]' "* that justifies postponing notice and opportunity for hearing. *Fuentes*, 407 U.S. at 90, 92 S.Ct. at 1999 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971)). But see *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 611-19, 94 S.Ct. 1895, 1902-06, 40 L.Ed.2d 406 (1974).



*United States v. Premises & Real Property at 4492 S. Livonia Rd.*, 889 F.2d 1258, 1263 (2d Cir. 1989) (emphasis added), *reh'g denied*, No. 88-6040, slip op. (2d Cir. Mar. 2, 1990). I see no basis to depart from this rule here. Although *Livonia* involved a seizure, all members of the present panel apparently agree that a constitutional "deprivation of a property interest" results from an attachment of real property. Connecticut's interest in routinely allowing pre-hearing attachments in all cases where the attachment is directed to real property and the plaintiff can make an *ex parte* showing of probable cause regarding the merits, on the other hand, seems virtually nugatory in terms of the standards articulated by the Supreme Court and outlined in *Livonia*.

I would not read *Di-Chem* to establish that any "early hearing" imparts constitutional validity to a deprivation of a property interest, whether the hearing occurs before or promptly after the challenged deprivation. The phrase "early hearing" was addressed to a statutory scheme which provided no hearing at any time during the pendency of the litigation to challenge the *bona fides* of the plaintiff's garnishment. I see no warrant for seizing upon this phrase to undercut the general

thrust of the Supreme Court's rulings in this area, as we have recently summarized them in *Livonia*. This is especially so since *Livonia* relies heavily on *Fuentes v. Shevin*, 487 U.S. 67 (1972), and two separate opinions in *Di-Chem* regard that case's main impact to be a reassertion of the authority of *Fuentes*. *See Di-Chem*, 419 U.S. at 608 (Stewart, J., concurring); 419 U.S. at 609 (Powell, J., concurring in the judgment).

Similarly, I would not read the Supreme Court's dismissal of the appeal in *Williams v. Bartlett* as a wholesale authorization of pre-hearing attachments of real property without regard to exceptional circumstances. As stated earlier, such a Supreme Court determination has precedential force, but of a limited nature. Even if this ruling can be read to intimate a more relaxed view of constitutional requirements where a provisional remedy leaves an owner with the use and occupancy of real property, I see little warrant, reading this summary ruling in the overall context of the Supreme Court's opinions in this area, to extend the relaxation beyond the lis pendens procedure. In the case of a lis pendens, the plaintiff has an interest in the specific property in question, *see Williams*, 189 Conn. at 479-80, 457 A.2d at 294 (lis pendens function of preventing prejudgment transfer of property particularly important, because of uniqueness of real estate, where plaintiff seeks specific performance relative to affected property), and the state has a more sharply defined interest in this "specified procedure whereby the rights of third-party purchasers are readily defined," *id.*

In sum, for the reasons stated at greater length and with considerably greater force by Judge Pratt, I concur in his conclusion that section 52-278e(a)(1) is constitu-



tionally defective because, unlike subdivision (2) of the same section (and sentence) dealing with personal property, it includes no requirement of extraordinary circumstances for the attachment of real property prior to any adversary hearing concerning that attachment. This brings me to my point of disagreement with Judge Pratt's opinion.

As indicated earlier, I do not agree that section 52-278e is constitutionally defective because it does not require a plaintiff to post a bond or other security before obtaining an attachment. Judge Pratt apparently accepts the ruling in *Jones v. Preuit & Mauldin*, 822 F.2d 998 (11th Cir. 1987), *vacated on other grounds*, 851 F.2d 1321 (11th Cir. 1988) (in banc), *vacated and remanded mem.*, 109 S.Ct. 1105 (1989), that a debtor's "financial interest must be protected in the event of a wrongful prejudgment attachment, *either* via the posting of a bond by the creditor who seeks the writ, *or* by allowing an action for damages suffered as a result of a wrongful attachment." *Id.* at 1002 (emphasis added). He observes, however, that the statute considered in *Jones* allowed the defendant to challenge the propriety of the attachment and recover his damages in the same proceeding, whereas he deems the pertinent Connecticut provision, Conn. Gen. Stat. § 52-568(a) (West Supp. 1989), to require the defendant to bring a separate action for damages. He further concludes that the requirement of a separate action presents a distinction of constitutional dimension.

I would hesitate to join in this conclusion, which seems to break new ground in its interpretation of due process requirements. I do not believe that we need reach this question, however, because I disagree with the

reading of Connecticut law upon which it is premised. Specifically, it would appear that the challenge of a defendant to an attachment pursuant to section 53-278e(a)(1) could be litigated, pursuant to the Connecticut vexatious litigation statute, Conn. Gen. Stat. § 52-568(a) (West Supp. 1989), at the conclusion of the litigation in which the attachment occurred. In *Hydro Air of Conn., Inc. v. Versa Technologies*, 99 F.R.D. 111 (D. Conn. 1983), where a defendant was allowed to plead a counterclaim pursuant to section 52-568(a), the court said:

> Of course, a ruling on [defendant's] counterclaim must await a decision on the merits of [plaintiff's] complaint. As a matter of judicial economy, the court will permit [defendant] to raise its claim that the instant suit is vexatious as a counterclaim. In this way, the question of whether [plaintiff] has sued vexatiously can be considered along with the merits of that claim and a decision on the counterclaim rendered speedily after the main suit is terminated, without the necessity of a separate proceeding. Cf. Fed.R.Civ.Pro. 54(b). *Compare Paint Products Co. v. Minwax Co.*, 448 F.Supp. 656, 658 (D.Conn.1978) (Daly, J.) ("Given the requirement that the suit must terminate in favor of the defendant, it is impossible to use vexatious litigation as a counterclaim in the very suit the defendant claims is vexatious.") with *Sonnichsen v. Streeter*, 4 Conn. Cir. 659, 666-67, 239 A.2d 63 (1967) ("There appears to be no practical need for further litigation, and justice will best be served if the residuum of issues be terminated in the present suit.").

99 F.R.D. at 113.



As this quotation indicates, a prior decision of the same court, *Paint Products Co.*, takes a view opposed to that expressed in *Hydro Air. Paint Products Co.*, however, does not cite *Sonnichsen v. Streeter*, which appears to establish a Connecticut rule that damages for vexatious litigation may be recovered by counterclaim in the very action which constitutes the vexatious litigation. *See Sonnichsen*, 4 Conn. Cir. Ct. at 665-68, 239 A.2d at 67-69. I therefore conclude that section 52-568(a) cures any constitutional deficiency that might otherwise result from the failure of section 52-278e to include a bond or security requirement for the plaintiff.

It is true, as Judge Pratt points out, that the statutory remedy provided by Connecticut would not be available where a case settles. As a practical matter, however, most settlements would require a defendant to release an attaching plaintiff from further liability to the defendant, whatever the statutory or other basis of the defendant's rights and remedies vis-a-vis the attachment.

I note, finally, that an invalidation of section 52-278e on this separate ground in its application to real property (subdivision (1)) would apply with equal force, by necessary implication, to the application of this section to personal property (subdivision 2). There is no distinction between these subdivisions with respect to the failure of the attachment statute to include a bond or security requirement for the plaintiff. Accordingly, if the Connecticut vexatious litigation statute, section 52-568(a), is not deemed to cure the perceived deficiency as to real property, it would be equally ineffective with respect to personal property, and section 52-278e would be unconstitutional *in toto* for failure to include a bond or security requirement for the plaintiff.

In sum, I concur in Judge Pratt's opinion for the court to the extent that it invalidates Conn. Gen. Stat. § 52-278e(a)(1) for its authorization of attachments of real estate in civil cases prior to any adversary hearing, on the basis of an *ex parte* showing "that there is probable cause to sustain the validity of the plaintiff's claim," but do not join that opinion in its ruling that "the lack of a bond or security provision in the attachment procedure itself is [an additional] flaw of constitutional magnitude."

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JON O. NEWMAN, *Circuit Judge* (dissenting):

Because I do not believe that the Connecticut prejudgment remedy for attaching real property is unconstitutional, I respectfully dissent.

Connecticut permits any person starting a lawsuit to file on the land records an attachment of the real property of the defendant. Conn. Gen. Stat. § 52-278e(a)(1). This prejudgment remedy assures the plaintiff a source of funds in the event the lawsuit is successful. To obtain this attachment the plaintiff must present sworn evidence sufficient to persuade a state court judge at an *ex parte* hearing that probable cause exists to believe that the lawsuit will be successful. *Id.* If an attachment is permitted, the defendant is entitled to an "expeditious" adversary hearing at which the attachment will be dissolved unless the plaintiff establishes probable cause in the context of an adversary hearing. *Id.* § 52-278e(c). Connecticut permits appellate review of an order denying a motion to dissolve an attachment. *Id.* § 52-278*l*(a). To assure that a defendant becomes aware of his right



to challenge an *ex parte* real estate attachment, Connecticut requires the attaching plaintiff to serve the defendant with notice of his right to a hearing to challenge the claim of probable cause, to request that the attachment be vacated or modified, or that a bond be substituted, or to claim exemption from attachment. *Id.* 52-278e(b). Connecticut also permits a defendant to recover double damages for commencing a civil lawsuit without probable cause. *Id.* § 52-568(a)(1) (West Supp. 1989).

The Court concludes that these protections fall short of the requirements of the Due Process Clause. The Court believes that a real estate attachment may not be issued until probable cause has been established at an adversary hearing. In addition, Judge Pratt believes that due process requires Connecticut to condition the grant of an attachment on the plaintiff's posting a bond for damages in the event the attachment is determined to be wrongful and to provide a damage remedy for wrongful attachment as part of the attachment scheme, rather than as part of the general remedy for vexatious litigation. However, since this latter point does not command the support of a majority of the panel, it is not a requirement imposed by today's ruling.

The Due Process Clause is not a code of civil procedure. It assures that no state will "deprive" any person of "property" without "due process of law." U.S. Const. amend. XIV. An *ex parte* prejudgment attachment of real estate does not deprive the owner of any possessory rights in his property. At most, it impairs the market value of the property during the brief interval between the *ex parte* attachment and the "expeditious" adversary hearing required by state law. If the owner

has no plans to sell the property or borrow upon it during that interval, the *ex parte* attachment has caused him no adverse consequence. If, during that interval, he wishes to realize the full market value of his property, he may replace the attachment with a bond.[1] Nevertheless, I can agree that the impaired market value, though temporary and remediable, is a sufficient "deprivation" to warrant some due process protection. I disagree, however, that due process requires more than Connecticut has provided, which includes (1) a demonstration of probable cause, (2) factual allegations, (3) evidence supported by oath, (4) a pre-attachment determination by a state court judge of the sufficiency of the probable cause showing, (5) a prompt post-attachment adversary hearing, (6) notice of the right to such a hearing, (7) appellate review of an adverse decision, and (8) double damages in the event suit is commenced without probable cause.

The Court finds these protections constitutionally deficient for lack of a pre-attachment adversary hearing. Reliance is placed on a line of Supreme Court cases dealing with prejudgment remedies. *See Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975). All of these case, however, are distinguishable from the pending case in a crucial respect: They involved prejudgment remedies that totally deprived the defendant of the possession, use, and enjoyment of his property. In *Sniadach*, the

1 If a request to replace the attachment with a bond were denied, it would be arguable that the statute has been unconstitutionally applied. But no such request was made or refused in this case.



defendant lost his wages, "a specialized type of property presenting distinct problems in our economic system." 395 U.S. at 340. In *Fuentes*, the defendants lost their personal property, which was seized and sold. In *Mitchell*, where an *ex parte* hearing was deemed sufficient, property was seized and sequestered. In *Di-Chem*, funds owed to the defendant were garnished, putting them "totally beyond use during the pendency of the litigation." 419 U.S. at 606. I see no basis to apply the same due process protections deemed necessary for these total deprivations of property to the relatively minor impairment of interests caused by an attachment of real estate. Though the impairment may be deemed a deprivation, it is one so slight as to require no more process than Connecticut has provided.[2]

The Court supports the equation between the total deprivations involved in the Supreme Court's prejudgment remedy cases and the minor impairment involved in this case by enlisting our recent decision in *United States v. Premises & Real Property at 4492 S. Livonia Rd.*, 889 F.2d 1258, 1263 (2d Cir. 1989), where we said, "As a general rule, due process has been held to require notice and an opportunity to be heard prior to the deprivation of a property interest." But *Livonia*, which I

2 In *Fuentes v. Shevin*, 407 U.S. at 86, the Court observed, "The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause." Thus, the brief duration of the impairment in the market value of the property does not remove it from the category of "deprivation" entitled to due process protection, but surely the brevity of the impairment significantly affects the extent of process that is due. "[T]he length . . . of a deprivation of use or possession would be another factor to weigh in determining the appropriate form of hearing . . . ." *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. at 606.

joined, involved precisely the type of total deprivation that the Supreme Court cases on prejudgment remedies had involved: The Government's process, obtained *ex parte*, entitled it to seize the defendant's home. Requiring an adversary hearing before that type of deprivation is no authority for imposing the same procedure on an impairment of market value that will last but a few days and can very likely be removed at once in favor of a bond if circumstances warrant.

The private interest affected is the first of the three factors to be assessed in determining how much process is due. *See Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). In *Sniadach* and its progeny the private interest was significant. In the pending case, it is far less significant and, for all that appears in the record, is entirely theoretical. There is no indication that the landowner sought to sell his property or borrow on it during the interval between the *ex parte* hearing and his opportunity for a prompt adversary hearing.

The Supreme Court has informed us that not every state sanctioned impairment in the marketability of real property must be preceded by an adversary hearing. *See Bartlett v. Williams*, 464 U.S. 801 (1983) (dismissing for want of a substantial federal question an appeal challenging Connecticut's lis pendens procedure, Conn. Gen. Stat. §§ 52-325, -325a, 325b, for lack of a pre-filing hearing). Though not entitled to the same deference due a decision reached after plenary consideration, *Caban v. Mohammed*, 441 U.S. 380, 390 n.9 (1979), the dismissal in *Bartlett* is a ruling on the merits and a binding precedent, *Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975). The case for allowing an *ex parte* lis pendens procedure may be somewhat stronger than the case for allowing *ex*



*parte* prejudgment attachments, but from the standpoint of the private interest adversely affected, the attachment and the lis pendens are indistinguishable, and both are far less significant than the total deprivations that occurred in the *Sniadach* line of cases.

Moreover, in *Di-Chem* the Supreme Court identified the defects of the Georgia garnishment procedure as lack of participation by a judicial officer, lack of notice to the defendant, and lack of opportunity for an "early hearing." 419 U.S. at 606. If the Court had shared the view of the panel majority in this case that due process requires an adversary hearing before any prejudgment remedy may issue, it could hardly have contented itself with pointing out the lack of an "early hearing."

Judge Pratt, but not Judge Mahoney nor myself, finds the Connecticut statute additionally deficient because damages for wrongful attachment are not secured by a bond nor recoverable in the litigation in which the attachment was obtained. I agree with Judge Mahoney that Connecticut appears to allow a claim for wrongful commencement of litigation to be presented as a counterclaim in the main lawsuit. *See Sonnichsen v. Streeter*, 4 Conn. Cir. Ct. 659, 666-67, 239 A.2d 63, 67-69 (1967); *see also Hydro Air of Conn., Inc. v. Versa Technologies, Inc.*, 99 F.R.D. 111 (D. Conn. 1983) (applying Connecticut law). Even if state law required a separate lawsuit, I do not believe that the Constitution regulates state procedure to the extent of insisting that damages for wrongful attachment must be available in the underlying lawsuit rather than in a subsequent suit.

More fundamentally, however, I do not agree that a damage suit or a bond requirement is a constitutionally mandated component of a valid prejudgment remedy.

The bond requirement was urged by Justice Powell, speaking only for himself in his concurrence in *Di-Chem*. 419 U.S. at 611. We should be chary of concurrence jurisprudence. The Supreme Court has an obligation, especially when outlining new constitutional requirements,[3] to express a ruling that commands the support of a majority of the Court. The modern Court has considered various forms of prejudgment remedies on four occasions. It has found the procedures constitutionally deficient in *Sniadach*, *Fuentes*, and *Di-Chem*, and valid in *Mitchell*. None of these decisions holds that due process requires the attaching plaintiff to post a bond and respond in damages for wrongful attachment. Due process is the procedure constitutionally required for taking certain kinds of action; it is not a guaranty of damage remedies for wrongful action, much less of security for the recovery of such damages.

I must acknowledge that the Supreme Court's opinion in *Mitchell*, upholding the validity of a prejudgment sequestration remedy, contains favorable references to a damage action for wrongful issuance of a writ, 416 U.S. at 617, and to the plaintiff's obligation to post a bond to secure such damages, *id.* at 608. But I see no basis for translating these references into constitutional requirements. The damage remedy was mentioned only as a feature that "buttressed" the state's basic protection of providing judicial control of the entire sequestration process, *id.* at 617, and the bond requirement seems to be mentioned only in describing the overall system, *id.* at 608. I have no doubt that such features are meri-

3 In an earlier day, prejudgment remedies without a prior adversary hearing were routinely found to be constitutional. *See McKay v. McInne*, 279 U.S. 820 (1929) (per curiam); *Coffin Bros. v. Bennett*, 277 U.S. 29 (1928); *Ownbey v. Morgan*, 256 U.S. 94 (1921).



torious. I do not believe, however, that the Supreme Court regards them as constitutional requirements.

Connecticut's procedure for prejudgment real estate attachments has been held to comport with due process requirements by a unanimous Connecticut Supreme Court, *see Fermont Division, Dynamics Corp. of America, Inc. v. Smith*, 178 Conn. 393, 423 A.2d 80 (1979) (Peters, J.), and by three judges of the District Court for the District of Connecticut, *see Shaumyan v. O'Neill*, 716 F. Supp. 65 (D. Conn. 1989) (Nevas, J.); *Pinsky v. Duncan*, 716 F. Supp. 58 (D. Conn. 1989) (Eginton, J.); *Read v. Jacksen*, Civ. No. B-85-85 (D. Conn. Feb. 18, 1988) (Zampano, J.). The opinions of now Chief Justice Peters in *Fermont* and of Judge Nevas in *Shaumyan* are particularly thoughtful and persuasive. Though in dissent, I am pleased to note my agreement with their views.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 201—August Term 1989

Argued: October 5, 1989 Decided: March 9, 1990

Petitions for Rehearing
Filed: March 22, 1990, March 23, 1990

Decided: April 25, 1990

Docket No. 89-7521

ROLAND PINSKY, JENNIE PINSKY, EILEEN FEDOWITZ and BRIAN K. DOEHR,

*Plaintiffs-Appellants,*

—against—

RICHARD K. DUNCAN, JOSEPH GOLDEN INSURANCE AGENCY, INC., and JOHN F. DI GIOVANNI,

*Defendants,*

RICHARD K. DUNCAN and JOHN F. DI GIOVANNI,

*Defendants-Appellees,*

STATE OF CONNECTICUT,

*Intervenor.*



Before:

NEWMAN, PRATT, and MAHONEY,
*Circuit Judges.*

Petitions for rehearing of appeal that declared unconstitutional, on due process grounds, Connecticut statute governing prejudgment attachment of real estate.

Granted in part and denied in part.

JOANNE S. FAULKNER, New Haven, CT, *for Plaintiff-Appellant Brian K. Doehr.*

ANDREW M. CALAMARI, Bronx, NY (Calamari & Calamari, of Counsel), *for Defendant-Appellee John F. Di Giovanni.*

HENRY S. COHN, Hartford, CT, Assistant Attorney General of the State of Connecticut (Clarine Nardi Riddle, Attorney General of the State of Connecticut, of Counsel), *for Intervenor.*

PRATT, *Circuit Judge*:

John F. Di Giovanni and the State of Connecticut have petitioned for rehearing of our decision in this appeal filed on March 9, 1990. The petitions are granted

only insofar as we amend our prior opinion to hold that, except for the present case, our declaration of the unconstitutionality of Conn. Gen. Stat. § 52-278e(a)(1) shall have prospective effect only, *i.e.*, shall be applicable only to attachments filed after March 9, 1990. The petitions are denied in all other respects.

In its petition, the State of Connecticut suggests that our decision is contrary to *McCahey v. L.P. Investors*, 774 F.2d 543 (2d Cir. 1985), a case not originally cited to us by any of the briefs of any party. While there is passing dictum in *McCahey* that might be interpreted as inconsistent with the panel majority's opinion, the point was not extensively considered there and we do not view *McCahey*'s holding as conflicting with our own.

The state also suggests that it was not given sufficient opportunity to intervene under 28 U.S.C. § 2403(b). Although the district court failed to notify the state of its right to intervene, we afforded it that opportunity on appeal. The state accepted the invitation, fully briefed the constitutional issues for us, and in doing so made no claim that it wished to reopen the trial record to present additional evidence. We are satisfied that its interests have been adequately protected.

Finally, in order to avoid ambiguity, the following references in the slip opinion to Conn. Gen. Stat. § 52-278e will be expanded in the final opinion to read § 52-278e(a)(1): page 2197, line 5; page 2202, line 12; page 2205, line 30; and page 2206, line 5.

So ordered.



United States Court of Appeals
FOR THE
SECOND CIRCUIT

FILED
MAY 30 1990

**At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-ninth day of May, one thousand nine hundred and ninety.**

ROLAND PINSKY, JENNIE PINSKY, EILEEN FEDOWITZ and BRIAN K. DOEHR,
*Plaintiffs-Appellants,*

— against — DOCKET NUMBER: 89-7521

RICHARD K. DUNCAN, JOSEPH GOLDEN INSURANCE AGENCY, INC., and JOHN F. DI GIOVANNI,
*Defendants,*

RICHARD K. DUNCAN and JOHN F. DI GIOVANNI,
*Defendants-Appellees,*

STATE OF CONNECTICUT,
*Intervenor.*

**Petitions for rehearing containing suggestions that the actions be reheard in banc having been filed herein by counsels for the intervenor State of Connecticut and the defendant-appellee John F. Di Giovanni, and the panel that heard the appeal having granted in part and denied in part said petition for rehearing in an opinion filed on April 25, 1990,**

**It is further noted that the suggestions for rehearing in banc have been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.**

**Elaine B. Goldsmith,**

**/s/ Tina Eve Brier**
**by: Tina Eve Brier,**
**Chief Deputy Clerk**

United States Court of Appeals
FOR THE SECOND CIRCUIT

FILED
JUN 25 1990

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 25th day of June, one thousand nine hundred and ninety.

PRESENT:
HONORABLE JON O. NEWMAN,
HONORABLE GEORGE C. PRATT,
HONORABLE J. DANIEL MAHONEY,
*Circuit Judges.*

ROLAND PINSKY, JENNIE PINSKY, EILEEN FEDOWITZ and BRIAN K. DOEHR,
*Plaintiffs-Appellants,*

— against — No. 89-7521

RICHARD K. DUNCAN, JOSEPH GOLDEN INSURANCE AGENCY, INC. and JOHN F. DI GIOVANNI,
*Defendants.*

On motion of Joanne S. Faulkner, attorney for plaintiff-appellant Doehr, the first paragraph of the decision of this court, dated April 25, 1990, granting in part the petition for rehearing, is modified to read as follows:

> John F. Di Giovanni and the State of Connecticut have petitioned for rehearing of our decision in this appeal filed on March 9, 1990. The petitions are granted only insofar as we amend our prior opinion to hold that, except for the attachment in the present case and those attachments filed on or before March 9, 1990, the constitutionality of which was challenged in a lawsuit filed prior to March 9, 1990 and still pending on that date, our declaration of the unconstitutionality of Conn. Gen. Stat. § 52-278e(a)(1) shall have prospective effect only, *i.e.*, shall be applicable only to attachments filed after March 9, 1990. The petitions are denied in all other respects.

/s/ Jon O. Newman
/s/ George C. Pratt
/s/ J. Daniel Mahoney



[AMENDED OPINION]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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No. 201 — August Term 1989

Argued: October 5, 1989 Decided: March 9, 1990

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Petitions for Rehearing
Filed: March 22, 1990, March 23, 1990

Decided: April 25, 1990
Amended June 25, 1990

Docket No. 89-7521

---

ROLAND PINSKY, JENNIE PINSKY, EILEEN FEDOWITZ and BRIAN K. DOEHR,
*Plaintiffs-Appellants,*

— against —

RICHARD K. DUNCAN, JOSEPH GOLDEN INSURANCE AGENCY, INC., and JOHN F. DI GIOVANNI,
*Defendants,*

RICHARD K. DUNCAN and JOHN F. DI GIOVANNI,
*Defendants-Appellees,*

STATE OF CONNECTICUT,
*Intervenor.*

---

Before:

NEWMAN, PRATT, and MAHONEY,
*Circuit Judges.*

---

Petitions for rehearing of appeal that declared unconstitutional, on due process grounds, Connecticut statute governing prejudgment attachment of real estate.

Granted in part and denied in part.

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JOANNE S. FAULKNER, New Haven, CT, *for Plaintiff-Appellant Brian K. Doehr.*

ANDREW M. CALAMARI, Bronx, NY (Calamari & Calamari, of Counsel), *for Defendant-Appellee John F. Di Giovanni.*

HENRY S. COHN, Hartford, CT, Assistant Attorney General of the State of Connecticut (Clarine Nardi Riddle, Attorney General of the State of Connecticut, of Counsel), *for Intervenor.*

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PRATT, *Circuit Judge:*

John F. Di Giovanni and the State of Connecticut have petitioned for rehearing of our decision in this appeal filed on March 9, 1990. The petitions are granted only insofar as we amend our prior opinion to hold that, except for the attachment in the present case and those attachments filed on or before March 9, 1990, the constitutionality of which was challenged in a lawsuit filed prior to March 9, 1990 and still pending on that date, our declaration of the unconstitutionality of Conn. Gen. Stat. § 52-278e(a)(1) shall have prospective



effect only, *i.e.*, shall be applicable only to attachments filed after March 9, 1990. The petitions are denied in all other respects.

In its petition, the State of Connecticut suggests that our decision is contrary to *McCahey v. L.P. Investors*, 774 F.2d 543 (2d Cir. 1985), a case not originally cited to us by any of the briefs of any party. While there is passing dictum in *McCahey* that might be interpreted as inconsistent with the panel majority's opinion, the point was not extensively considered there and we do not view *McCahey*'s holding as conflicting with our own.

The state also suggests that it was not given sufficient opportunity to intervene under 28 U.S.C. § 2403(b). Although the district court failed to notify the state of its right to intervene, we afforded it that opportunity on appeal. The state accepted the invitation, fully briefed the constitutional issues for us, and in doing so made no claim that it wished to reopen the trial record to present additional evidence. We are satisfied that its interests have been adequately protected.

Finally, in order to avoid ambiguity, the following references in the slip opinion to Conn. Gen. Stat. § 52-278e will be expanded in the final opinion to read § 52-278e(a)(1): page 2197, line 5; page 2202, line 12; page 2205, line 30; and page 2206, line 5.

So ordered.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FILED
FEB 17 9:06 AM '89

Roland Pinsky; Et al.

v. Civil No. N-88-339 (WWE)

Richard K. Duncan, Et al.

**MEMORANDUM OF DECISION ON DEFENDANT JOHN F. DIGIOVANNI'S MOTION FOR SUMMARY JUDGMENT**

In conjunction with several cases pending in the Connecticut Superior Court, each of the three defendants in this action secured an attachment of one of the plaintiffs' real property pursuant to Conn. Gen. Stat. Sec. 52-278e(a)(1). The plaintiffs claim that Section 52-278e(a)(1) is unconstitutional because it authorizes a plaintiff in a state court action to attach a defendant's real property without the filing of a bond and without prior notice and a hearing. They apparently make no claim that the statute was unconstitutional as applied in their particular cases.

On December 1, 1988, the Court granted defendant Joseph Golden Insurance Agency's motion for summary judgment after finding that Section 52-278e is constitutional. Presently pending is John F. DiGiovanni's motion for summary judgment which, like Joseph Golden Insurance Agency's motion, asserts the facial validity of Connecticut's prejudgment remedy statute. The Court considers this an opportunity to re-examine the merits of the plaintiffs' position. Upon reconsideration and for the reasons set forth below, defendant DiGiovanni's motion for summary judgment is GRANTED.

In relevant part, Conn. Gen. Stat. Sec. 52-278e provides:



> (a) The court or a judge of the court may allow the prejudgment remedy to be issued by an attorney without hearing as provided in sections 52-278c and 52-278d upon verification by oath of the plaintiff or of some competent affiant, that there is probable cause to sustain the validity of the plaintiff's claim and (1) that the prejudgment remedy requested is for the attachment of real property. . . .

Upon examination of this statute, Judge Zampano recently noted:

> Review of the Connecticut statute reveals that it was drafted with the dictates of due process, as the Supreme Court has articulated them, in mind. *See* Conn. Gen. Stat. Sections 52-278e(a), 52-278e(c); *Fermont Div., Dynamics Corp. of America, Inc. v. Smith*, 178 Conn. 393, 397 (1979) (section 52-278e exhibits all the saving characteristics that the law of procedural due process requires); *Sellner v. Beechwood Cons. Co.*, 176 Conn. 432, 434 (1979) (section 52-278e was "enacted in response to the constitutional instructions" of relevant United States Supreme Court precedent). The facial constitutional validity of Section 52-278e thus stands beyond question. . . .

*Read v. Jacksen*, Civil No. B-85-85, Ruling on Defendants' Motions for Summary Judgment, slip op. at 8 (D. Conn. February 19, 1988); *see also Shaumyan v. O'Neill*, Civil No. N-87-463, Ruling on Motions to Dismiss (D. Conn. June 21, 1988) (Nevas, J.) (instructing party mounting constitutional challenge to Section 52-278e(a)(1) to "fully address the implications of *Read*" in their summary judgment motions). Upon reconsideration of the plaintiffs' arguments, the Court continues to agree with Judge Zampano's suggestion that Section 52-278e(a)(1) is constitutional.

In a series of cases, none of which deals with the attachment of real property, the Supreme Court has provided guidance concerning the constitutionality of prejudgment remedy statutes. In *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969), the Supreme Court struck down a Wisconsin statute which authorized the prejudgment garnishment of wages without prior notice and hearing to the debtor. Noting that wages are "a specialized type of property presenting distinct problems in our economic system," the Court found that a statute under which a suing creditor could garnish wages without demonstrating a lien or prior interest in the property and without judicial supervision did not provide a debtor with sufficient procedural safeguards. *Id.* at 340.

Several years later, in *Fuentes v. Shevin*, 407 U.S. 67, (1972), the Supreme Court invalidated two replevin statutes which authorized a seller to repossess goods without judicial approval or participation. The Court noted that, absent extraordinary circumstances, a debtor must be notified and given the opportunity to contest a creditor's claim before his property may be subject to "outright seizure." *Id.* at 91.

By contrast, in *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974), the Supreme Court upheld the constitutionality of Louisiana's sequestration statute. Despite the fact that the statute did not provide notice and hearing before the sequestration of property, the Court found that it contained other procedural safeguards including: (1) the necessity of filing a detailed affidavit with the writ; (2) the posting of an adequate creditor's bond; (3) the return of the property upon the debtor's posting of a bond; (4) an immediate post-deprivation hearing; (5) creditor's liability for wrongful attachment; and, (6) judicial supervision of the entire process. *Id.* at 608–610.

Finally, in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), the Supreme Court invalidated a Georgia statute which permitted the garnishment of a business' bank account without prior notice or hearing. Unlike the statute in *Mitchell*, the Georgia statute did not require, *inter alia*:



(1) the filing of a detailed affidavit made upon personal knowledge of the facts: (2) a writ issued by a judge; or (3) a prompt post-garnishment hearing at which the creditor would be required to demonstrate probable cause for the garnishment. *Id.* at 607.

The gravamen of the plaintiff's argument is that the Connecticut statute is deficient because it does not provide every procedural protection to which the Supreme Court has referred in these four cases. However, as these cases clearly suggest, Section 52-278e need not provide every procedural safeguard to survive constitutional scrutiny. A defendant need only be provided an opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Accordingly, the Court may consider factors such as the length or severity of a deprivation of use or possession, when determining whether Connecticut's procedure, "as a whole," sufficiently protects a real property owner's rights. *See North Georgia Finishing*, 419 U.S. at 606; *Mitchell*, 416 U.S. at 610.

Viewed as a whole, Section 52-278e(1)(a) comports with due process. The statute provides for judicial supervision of the process in that it requires the prejudgment remedy to be issued by a judge. It "can be invoked only by a verified affidavit that contains factual, rather than merely conclusory, supporting allegations." *Fermont*, 178 Conn. at 397; *see* Conn. Gen. Stat. Sec. 52-278c(a)(2). A defendant whose property has been attached can require the plaintiff to show probable cause to sustain the prejudgment remedy in a prompt post-seizure hearing. *See* Conn. Gen. Stat. Sec. 52-278e(c) (Court shall hear such motion "expeditiously.") Where property rights are involved, the failure to provide a pretermination hearing ordinarily " 'is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate'." *Mitchell*, 416 U.S. at 611. Here, the existence of an opportunity to challenge the prejudgment seizure in a prompt manner is adequate because "[t]he defendant is neither deprived of the use or enjoyment of the

property pending a trial on the merits nor is his livelihood threatened by the deprivation of the right to freely transfer the realty." *Black Watch Farms, Inc. v. Dick*, 323 F.Supp. 100, 102 (D. Conn. 1971). The temporary and minor prehearing impairment of a defendant's property, when coupled with the purpose served by such an attachment, suggests that the fact that the statute does not provide for the filing of a bond prior to the attachment is unobjectionable. *See Cordoba Shipping Co., Ltd. v. Maro Shipping Ltd.*, 494 F.Supp. 183, 186 (D. Conn. 1980) ("'The general purpose of such an attachment is to secure the appearance of the defendant and to furnish security for any judgment plaintiff may receive.")

The motion for summary judgment is GRANTED.

SO ORDERED.

Dated at Bridgeport, Connecticut, this 16th day of February, 1989.

/s/ Warren W. Eginton

WARREN W. EGINTON, U.S.D.J.



UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ROLAND PINSKY, et al

v. CIVIL NO. N-88-339 (WWE)

RICHARD K. DUNCAN,
JOHN F. DIGIOVANNI

FEB 21 3:54 PM '89

**JUDGMENT**

This cause came on for consideration on the defendants' motions for summary judgment by the Honorable Warren W. Eginton, United States District Judge, and

The Court having considered the motions and all the papers submitted in connection therewith filed its Memorandum of Decision on Defendant John F. DiGiovanni's Motion For Summary Judgment granting defendant DiGiovanni's motion and further ruled for the reasons set forth in the Court's memorandum of decision on defendant DiGiovanni's motion the defendant Duncan's motion for summary judgment is granted and ordered the clerk to remove this action from the docket of the Court,

It is therefore ORDERED and ADJUDGED that judgment be and is hereby entered for the defendants and the case is removed from the docket of this court.

Dated at Bridgeport, Connecticut this 21st day of February, 1989.

KEVIN F. ROWE, Clerk

By /s/ Carol E. Cannady

Carol E. Cannady
Deputy in Charge

RETURN DATE: APRIL 19, 1988 | SUPERIOR COURT

JOHN F. DI GIOVANNI | JUDICIAL DISTRICT OF NEW HAVEN

VS. | AT MERIDEN

BRIAN K. DOEHR | MARCH 15, 1988

## APPLICATION

The undersigned represents:

1. That JOHN F. DI GIOVANNI of 273 Byron Road, South Meriden, Connecticut is about to commence an action against BRIAN K. DOEHR of 53 Woodland Street, Meriden, Connecticut pursuant to the attached proposed unsigned writ, summons, complaint and affidavit.

2. That there is probable cause that a judgment will be rendered in such matter in favor of the applicant and to secure such judgment the applicant seeks an order from this court directing that the following prejudgment remedy be issued to secure the sum of $75,000.00.

To attach the following described real property of the defendant, Brian K. Doehr, located in the City of Meriden and further described as follows:

As described on Schedule A attached hereto and made a part hereof.

3. The prejudgment remedy request is for an attachment of real property.

JOHN F. DI GIOVANNI

[illegible]
MAR 17 1988

BY: /s/ Joseph P. Patrucco
JOSEPH P. PATRUCCO
HIS ATTORNEY

order issued



RETURN DATE: APRIL 19, 1988 | SUPERIOR COURT

JOHN F. DI GIOVANNI | JUDICIAL DISTRICT OF NEW HAVEN

VS. | AT MERIDEN

BRIAN K. DOEHR | MARCH 16, 1988

## AFFIDAVIT

STATE OF CONNECTICUT )
) ss. At Meriden
COUNTY OF NEW HAVEN )

Personally appeared, John F. DiGiovanni, who being duly sworn, deposes and says:

1. I am thoroughly familiar with the facts contained in the unsigned complaint and in the application for prejudgment remedy in the above entitled matter, and the facts set forth in each are true to the best of my knowledge and belief.

2. On March 13, 1988 I was willfully, wantonly and maliciously assaulted by the defendant, Brian K. Doehr.

3. Said assault and battery broke my left wrist and further caused an ecchymosis to my right eye, as well as other injuries to my head, limbs and body.

4. My left arm is in a cast and I am restricted in my usual duties and I have further expended sums of money for medical care and treatment and I will be obliged to expend further sums in the future.

5. In my opinion, the foregoing facts are sufficient to show that there is probable cause that judgment will be rendered for the plaintiff.

/s/ John F. Di Giovanni

JOHN F. DI GIOVANNI, PLAINTIFF

On This this 16th day of March, 1988, before me, Joseph P. Patrucco, the undersigned officer, personally appeared, John F. DiGiovanni, known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained, as his free act and deed.

/s/ Joseph P. Patrucco

COMMISSIONER OF THE
SUPERIOR COURT



RETURN DATE: APRIL 19, 1988 — SUPERIOR COURT

JOHN F. DI GIOVANNI — JUDICIAL DISTRICT OF NEW HAVEN

VS. — AT MERIDEN

BRIAN K. DOEHR — MARCH 16, 1988

**ORDER FOR PREJUDGMENT REMEDY**

Whereas, the plaintiff in the above entitled action has made application for a prejudgment remedy to attach real property of the defendant, and

Whereas, from an examination of the application, proposed complaint and accompanying affidavit, it is found that there is probable cause to sustain the validity of the plaintiff's claim, that the application should be granted ex parte because the prejudgment remedy requested is for an attachment of real property.

Now, therefore, it is hereby ordered that the plaintiff may attach to the value of $75,000.00 the following goods or estate of the defendant, BRIAN K. DOEHR, the real estate as described in Schedule A attached hereto.

Dated at Meriden, Connecticut this 17th day of March, 1988.

BY THE COUNT ( ,J.)

[signature illegible]
JUDGE.

RETURN DATE: APRIL 19, 1988 | SUPERIOR COURT

JOHN F. DI GIOVANNI | JUDICIAL DISTRICT OF NEW HAVEN

VS. | AT MERIDEN

BRIAN K. DOEHR | MARCH 15, 1988

To Any Proper Officer:

By Authority of the State of Connecticut, you are hereby commanded, in accordance with the accompanying order, to attach to the value of $75,000.00, the goods or estate of BRIAN K. DOEHR, of 53 Woodland Street, Meriden, Connecticut and summon him to appear before the Superior Court for the Judicial District of New Haven at Meriden on the 19th day of April, 1988, such appearance to be made by each of defendants or their attorney by filing a written statement of appearance with the Clerk of the Court on or before the second day following the return date, then and there to answer unto JOHN F. DI GIOVANNI of 273 Byron Road, South Meriden, Connecticut, in a civil action wherein the plaintiff complains and alleges as set forth in the accompanying complaint.

E. Drezak of 39 Butler Street, Meriden, conn. is recognized in the sum of $250.00 to prosecute, etc.

/s/ Joseph P. Patrucco
JOSEPH P. PATRUCCO
COMMISSIONER OF THE
SUPERIOR COURT



RETURN DATE: APRIL 19, 1988 | SUPERIOR COURT

JOHN F. DI GIOVANNI | JUDICIAL DISTRICT OF NEW HAVEN

VS. | AT MERIDEN

BRIAN K. DOEHR | MARCH 15, 1988

## COMPLAINT

1. On March 13, 1988 the defendant assaulted the plaintiff and beat him with his fists.

2. Said assault and battery broke the plaintiff's left writ, and caused an ecchymosis to his right eye, as well as other injuries to my head, limbs and body.

3. The assault was willful, wanton and malicious.

4. As a result of said injuries the plaintiff has been and in the future will be obliged to expend sums of money for medical care and treatment, doctors, hospitals, x-rays, physio therapy, medical appliances and medicines.

5. As a further result of said injuries the plaintiff has been and will be restricted in his usual activities.

The Plaintiff Claims Damages.

PLAINTIFF

BY: /s/ Joseph P. Patrucco
JOSEPH P. PATRUCCO
HIS ATTORNEY

## AMOUNT IN DEMANT

The amount, legal interest or property in demand is not less than $15,000.00 exclusive or interest and costs.

## SCHEDULE A

All that certain piece or parcel of land, with all buildings and improvements thereon, known as No. 53 Woodland Street and situtated in the City of Meriden County of New Haven and State of Connecticut, bounded and described as follows:

NORTH: by land now or formerly of Caroline Treiber, 120 feet;

EAST: by land now or formerly of Meriden, Waterbury & Connecticut River Railroad, 54', 9";

SOUTH: by land now or formerly of Frank Klein, 95 feet;

WEST: by Woodland Street, 50 feet.



RETURN DATE: APRIL 19, 1988 — SUPERIOR COURT

JOHN F. DI GIOVANNI — JUDICIAL DISTRICT OF NEW HAVEN

VS. — AT MERIDEN

BRIAN K. DOEHR — MARCH 15, 1988

## NOTICE TO DEFENDANT

You have rights specified in the Connecticut General Statutes, including Chapter 903 a, which you may wish to exercise concerning this prejudgment remedy. These rights include: (1) The right to a hearing to object to the prejudgment remedy for lack of probable cause to sustain the claim; (2) The right to a hearing to request that the prejudgment remedy be modified, vacated or dismissed or that a bond be substituted; and (3) the right to a hearing as to any portion of the property attached which you claim is exempt from execution.

THE PLAINTIFF

BY: /s/ Joseph P. Patrucco
JOSEPH P. PATRUCCO
HIS ATTORNEY

## CHAPTER 903a

## PREJUDGMENT REMEDIES

**Sec. 52-278a. Definitions.** The following terms, as used in sections 52-278a to 52-278g, inclusive, shall have the following meanings, unless a different meaning is clearly indicated from the context:

(a) "Commercial transaction" means a transaction which is not a consumer transaction.

(b) "Consumer transaction" means a transaction in which a natural person obligates himself to pay for goods sold or leased, services rendered or moneys loaned for personal, family or household purposes.

(c) "Person" means and includes individuals, partnerships, associations and corporations.

(d) "Prejudgment remedy" means any remedy or combination of remedies that enables a person by way of attachment, foreign attachment, garnishment or replevin to deprive the defendant in a civil action of, or affect the use, possession or enjoyment by such defendant of, his property prior to final judgment but shall not include a temporary restraining order.

(e) "Property" means any present or future interest in real or personal property, goods, chattels or choses in action, whether such is vested or contingent.

**Sec. 52-278b. Prejudgment remedies, requirements; exception, waiver in commercial transaction.** Notwithstanding any provision of the general statutes to the contrary, no prejudgment remedy shall be available to a person in any action at law or equity unless he has complied with the provisions of sections 52-278a to 52-278g, inclusive, except an action upon a commercial transaction wherein the defendant has executed a waiver as provided in section 52-278f.



**Sec. 52-278c. Documents required. Forms. Hearing. Temporary restraining order. Entry fee. Service on defendant.** (a) Except as provided in sections 52-278e and 52-278f, any person desiring to secure a prejudgment remedy shall attach his proposed unsigned writ, summons and complaint to the following documents:

(1) An application, directed to the superior court to which the action is made returnable, for the prejudgment remedy requested;

(2) An affidavit is sworn to by the plaintiff or any competent affiant setting forth a statement of facts sufficient to show that there is probable cause that judgment will be rendered in the matter in favor of the plaintiff;

(3) A form of order that a hearing be held before the court or a judge thereof to determine whether or not the prejudgment remedy requested should be granted and that notice of such hearing be given to the defendant;

(4) A form of summons directed to a proper officer commanding him to serve upon the defendant at least four days prior to the date of the hearing, pursuant to the law pertaining to the manner of service of civil process, the application, a true and attested copy of the writ, summons and complaint, such affidavit and the order and notice of hearing;

(b) The application, order and summons shall be substantially in the form following:

APPLICATION FOR PREJUDGMENT REMEDY

To the Superior Court for the judicial district of . . .

The undersigned represents:

1. That . . . is about to commence an action against . . . of . . . (give name and address of defendant) pursuant to the attached proposed unsigned Writ, Summons, Complaint and Affidavit.

2. That there is probable cause that a judgment will be rendered in the matter in favor of the applicant and to secure the judgment the applicant seeks an order from this court directing that the following prejudgment remedy be issued to secure the sum of $. . . .:

a. To attach sufficient property of the defendant to secure such sum:

b. To garnishee . . . ., as he is the agent, trustee, debtor of the defendant and has concealed in his possession property of the defendant and is indebted to him.

c. (Other Type of Prejudgment Remedy Requested.)

Name of Applicant
By. . . .
His Attorney

ORDER

The above application having been presented to the court, it is hereby ordered, that a hearing be held thereon on . . . . at . . . . a.m. and that the plaintiff give notice to the defendant of the pendency of the application and of the time when it will be heard by causing a true and attested copy of the application, the proposed unsigned writ, summons, complaint, affidavit and of this order to be served upon the defendant by some proper officer or indifferent person on or before . . . ., and that due return of service be made to this court.

Dated at Hartford this . . . . day of . . . ., 19. . .

Clerk of the Court

SUMMONS

To the sheriff of the county of . . . ., his deputy, or either constable of the town of . . . ., in said county,



Greeting:

By authority of the state of Connecticut, you are hereby commanded to serve a true and attested copy of the above application, unsigned proposed writ, summons, complaint, affidavit and order upon . . . ., of . . . ., by leaving the same in his hands or at his usual place of abode on or before . . . .

Hereof fail not but due service and return make.

Dated at . . . . this . . . . day of . . . . 19. . .

Commissioner of the Superior Court

(c) The clerk upon receipt of all such documents in duplicate, if he finds them to be in proper form, shall fix a date for the hearing on the application and sign the order of hearing and notice except that if the application includes a request for a temporary restraining order, the court or a judge of hearing and notice. The entry fee shall be then collected and the duplicate original document shall be placed in the court file.

(d) The clerk shall deliver to the applicant's attorney the original of the documents for service. Service having been made, the original documents shall be returned to the court with the endorsement by the officer of his actions.

**Sec. 52-278d. Hearing on prejudgment remedy application. Determination by the court. Service of process.** (a) The defendant shall have the right to appear and be heard at the hearing. The hearing shall be limited to a determination of whether or not there is probable cause to sustain the validity of the plaintiff's claim. If the court, upon consideration of the facts before it, finds that the plaintiff has shown probable cause to sustain the validity of his claim, then the prejudgment remedy applied for shall be granted as requested or as modified by the court unless the prejudgment remedy or application for such prejudgment remedy was dismissed or withdrawn pursuant to the provisions of section 52-278j.

(b) The clerk, upon the granting of the application for prejudgment remedy, shall deliver to the applicant's attorney the proposed writ, summons and complaint for service of process. If the court does not grant the application for any reason, including the failure of the plaintiff to serve the defendant, only a summons and complaint may be issued and served. In either event, the plaintiff may alter the return date of the writ, summons and complaint or the summons and complaint, as the case may be. No additional entry fee shall be collected upon the return of such action to court unless the prejudgment remedy or application for such prejudgment remedy was dismissed or withdrawn pursuant to the provisions of section 52-278j.

(c) If a prejudgment remedy is issued and the defendant moves the court for a stay, the court may, if it determines justice so requires, stay such order if the defendant posts a bond, with surety, in a sum determined by such judge to be sufficient to indemnify the adverse party for any damage which may accrue as a result of such stay.

**Sec. 52-278e. Allowance of prejudgment remedy without hearing. Notice to defendant. Subsequent hearing and order.** (a) The court or a judge of the court may allow the prejudgment remedy to be issued by an attorney without hearing as provided in sections 52-278c and 52-278d upon verification by oath of the plaintiff or of some competent affiant, that there is probable cause to sustain the validity of the plaintiff's claim and (1) that the prejudgment remedy requested is for an attachment of real property; or (2) that there is reasonable likelihood that the defendant (A) neither resides in nor maintains an office or place of business in this state and is not otherwise subject to jurisdiction over his person by the court, or (B) has hidden or will hide himself so that process cannot be served on him or (C) is about to remove himself or his property from this state or (D) is about to fraudulently dispose of or has fraudulently disposed of any of his property with intent to hinder, delay or defraud his



creditors or (E) has fraudulently hidden or withheld money, property or effects which should be liable to the satisfaction of his debts or (F) has stated he is insolvent or has stated he is unable to pay his debts as they mature.

(b) If a prejudgment remedy is granted pursuant to this section, the plaintiff shall include in the process served on the defendant the following notice prepared by the plaintiff: YOU HAVE RIGHTS SPECIFIED IN THE CONNECTICUT GENERAL STATUTES, INCLUDING CHAPTER 903a, WHICH YOU MAY WISH TO EXERCISE CONCERNING THIS PREJUDGMENT REMEDY. THESE RIGHTS INCLUDE (1) THE RIGHT TO A HEARING TO OBJECT TO THE PREJUDGMENT REMEDY FOR LACK OF PROBABLE CAUSE TO SUSTAIN THE CLAIM; (2) THE RIGHT TO A HEARING TO REQUEST THAT THE PREJUDGMENT REMEDY BE MODIFIED, VACATED OR DISMISSED OR THAT A BOND BE SUBSTITUTED; AND (3) THE RIGHT TO A HEARING AS TO ANY PORTION OF THE PROPERTY ATTACHED WHICH YOU CLAIM IS EXEMPT FROM EXECUTION.

(c) The defendant appearing in such action may move to dissolve or modify the prejudgment remedy granted pursuant to this section in which event the court shall proceed to hear and determine such motion expeditiously. If the court determines at such hearing requested by the defendant that there is probable cause to sustain the validity of the plaintiff's claim, then the prejudgment remedy granted shall remain in effect. If the court determines there is no such probable cause, the prejudgment remedy shall be dissolved. An order shall be issued by the court setting forth the action it has taken.

**Sec. 52-278f. Effect of waiver of notice and hearing in commercial transactions.** In an action upon a commercial transaction, as defined in section 52-278a, wherein the defendant has waived his right to a notice and hearing under

sections 52-278a to 52-278g, inclusive, the attorney for the plaintiff shall issue the writ for a prejudgment remedy without securing a court order provided that the complaint shall set forth a copy of the waiver.

**Sec. 52-278g. Motion to preserve existing prejudgment remedies.** A plaintiff who has secured a prejudgment remedy prior to May 30, 1973, may make a motion to the court in which such action is pending for a hearing as set forth in section 52-278d with notice thereof to the defendant or his attorney. If the court, upon consideration of the facts before it, finds that the plaintiff has shown probable cause to sustain the validity of his claim, such prejudgment remedy secured shall be effective from the date of such hearing and an order to that effect shall be issued by the court. Any such prejudgment remedy which is not perfected on or before October 1, 1977, shall be void and of no effect.

**Sec. 52-278h. Application for prejudgment remedy filed by the plaintiff.** The provisions of this chapter shall apply to any application for prejudgment remedy filed by the plaintiff at any time after the institution of the action, and the forms and procedures provided therein shall be adapted accordingly.

**Sec. 52-278i. (Formerly Sec. 52-282). Order for prejudgment remedy on set-off or counterclaim.** Any defendant in any civil action, upon filing a set-off or counterclaim containing a claim for money damages, may, at any time during the pendency of such action, apply in writing to the court before which such action is pending, or, when such court is not in session, to any judge thereof, for an order for a prejudgment remedy against the estate of the party or parties against whom such claim has been made. Such application shall be substantially in the form provided by subsection (b) of section 52-278c, adapted accordingly. A hearing on such motion



shall be held in accordance with the provisions of section 52-278d, adapted accordingly, and if the court, upon consideration of the facts before it, finds that the defendant has shown probable cause to sustain the validity of his claim, then the prejudgment remedy applied for shall be granted as requested or as modified by the court and the court shall issue such an order, directed to any proper officer, stating the amount and estate to be attached and the time of return, which order shall be served and returned in the same manner as an original writ of attachment, and when returned shall become a part of the files and records in the action. The estate attached shall be held to respond to the final judgment in the same manner as if it had been attached in an action originally brought for the recovery of the amount claimed in such set-off or counterclaim. The provisions of section 52-278e, except subparagraphs (A) and (B) of subdivision (2) thereof, and sections 52-278f and 52-278g, adapted accordingly, shall apply to any application for a prejudgment remedy sought under this section.

**Sec. 52-278j. Dismissal or withdrawal of prejudgment remedy.** (a) If an application for a prejudgment remedy is granted but the plaintiff, within ninety days thereof, does not serve and return to court the writ, summons and complaint for which the prejudgment remedy was allowed, the court on its own motion or on the motion of any interested party may dismiss the prejudgment remedy.

(b) If an application for a prejudgment remedy is denied and the plaintiff, within ninety days thereof, does not serve and return to court the writ of summons and complaint for which the prejudgment remedy was requested, or if a date for a hearing upon a prejudgment remedy is scheduled by the clerk and such hearing is not commenced within ninety days thereof, except as provided in section 52-278e, the court on its own motion may order the application to be considered as having been withdrawn.

(c) An application for a prejudgment remedy or a prejudgment remedy which is granted but not served may be withdrawn in the same manner as a civil cause of action.

**Sec. 52-278k. Modification of prejudgment remedy.** The court may, upon any application for prejudgment remedy under sections 52-278c, 52-278e, 52-278h or 52-282, modify the prejudgment remedy requested as may be warranted by the circumstances, and may, upon motion and after hearing, at any time modify or vacate any prejudgment remedy heretofore granted upon the presentation of evidence which would have justified such court in modifying or denying such prejudgment remedy at an initial hearing thereunder.

**Sec. 52-2781. Appeal.** (a) An order (1) granting or denying a prejudgment remedy following a hearing under section 52-278d or (2) granting or denying a motion to dissolve or modify a prejudgment remedy under section 52-278e or (3) granting or denying a motion to preserve an existing prejudgment remedy under section 52-278g shall be deemed a final judgment for purposes of appeal.

(b) No such appeal shall be taken except within seven days of the rendering of the order from which the appeal is to be taken.

(c) No such order shall be stayed by the taking of an appeal except upon the order of the judge who made such order, and any such stay shall be granted only if the party taking the appeal posts a bond, with surety, in a sum determined by such judge to be sufficient to indemnify the adverse party for any damages which may accrue as a result of such stay.

(d) If a motion to discharge such prejudgment remedy is brought by the defendant, the property affected by such remedy may be restored to the use of the defendant, if the



defendant posts a bond with surety in an amount determined by such judge to be sufficient to indemnify the plaintiff for any damages which may accrue by the defendant's continued use of such property, until such time as such motion is decided.

**Sec. 52-278m. When personal service not required.** Whenever a prejudgment remedy is sought under the provisions of sections 52-278h or 52-278i against a party who has previously filed a general appearance in such action, personal service of any application or order upon such party shall not be required, unless ordered by the court, but any such application or order may be served in the same manner as any motion in such action.

**Sec. 52-278n. Motion to disclose property. Order for disclosure. Substitution of surety.** (a) The court may, on motion of a party, order an appearing defendant to disclose property in which he has an interest or debts owing to him sufficient to satisfy a prejudgment remedy. The existence, location and extent of the defendant's interest in such property or debts shall be subject to disclosure. The form and terms of disclosure shall be determined by the court.

(b) A motion to disclose pursuant to this section may be made by attaching it to the application for a prejudgment remedy or may be made at any time after the filing of the application.

(c) The court may order disclosure at any time prior to final judgment after it has determined that the party filing the motion for disclosure has, pursuant to section 52-278d, 52-278e or 52-278i, probable cause sufficient for the issuance of a prejudgment remedy.

(d) A defendant, in lieu of disclosing assets pursuant to subsection (a) of this section, may move the court for substitution either of a bond with surety substantially in compliance with sections 52-307 and 52-308, or of other sufficient security.

(e) Rules of court shall be enacted to carry out the foregoing provisions and may provide for reasonable sanctions to enforce orders issued pursuant to this section.